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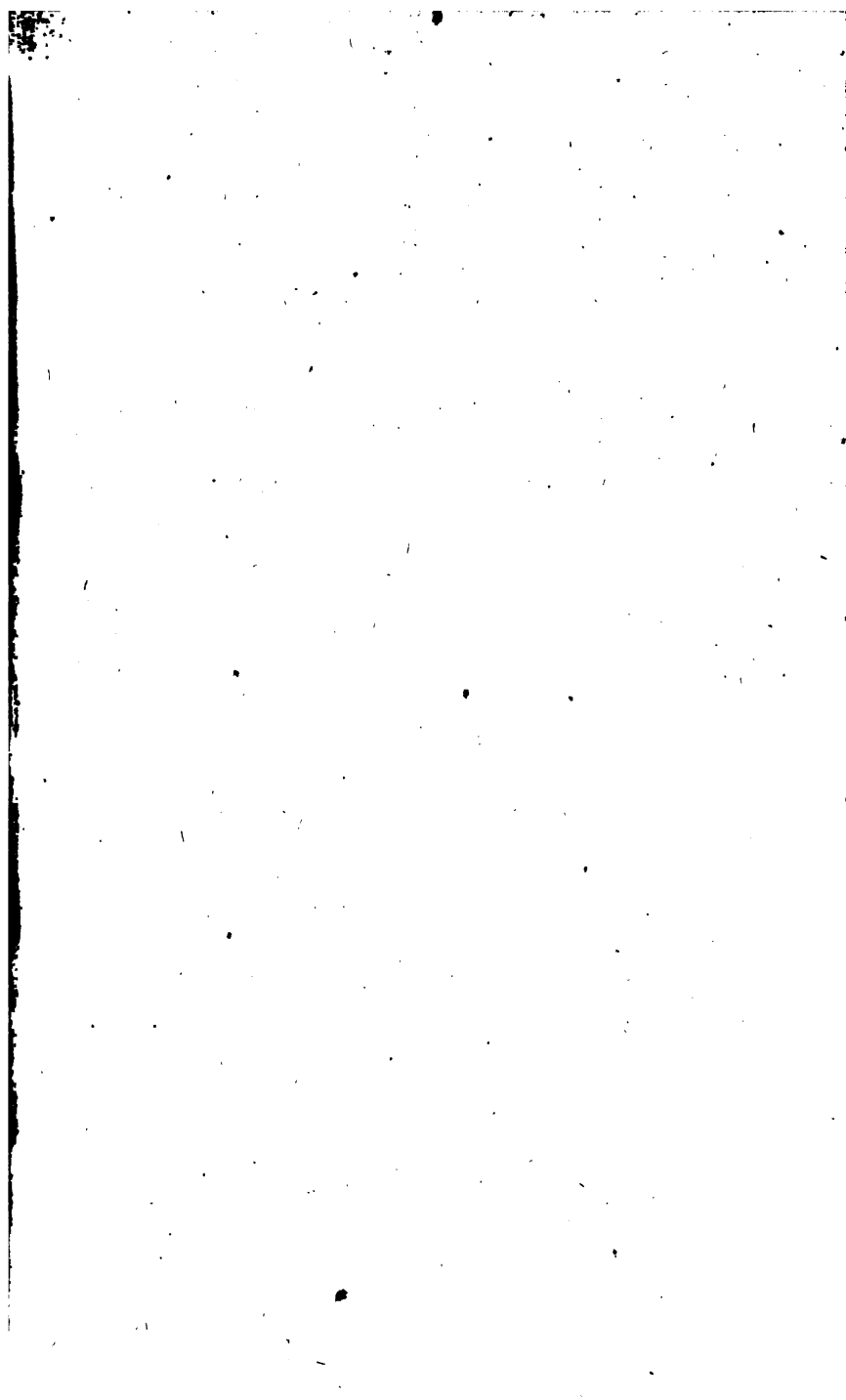
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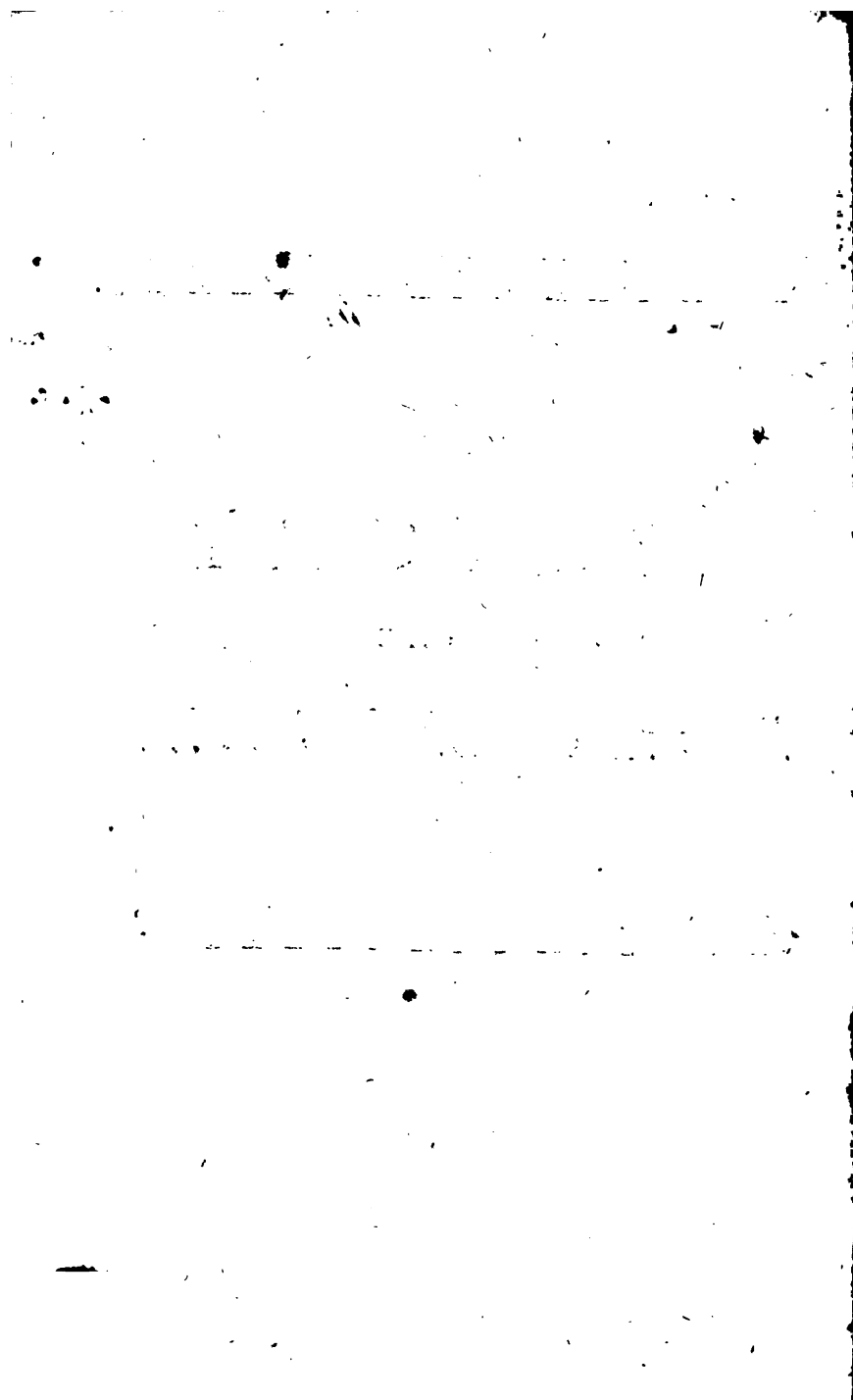
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THE
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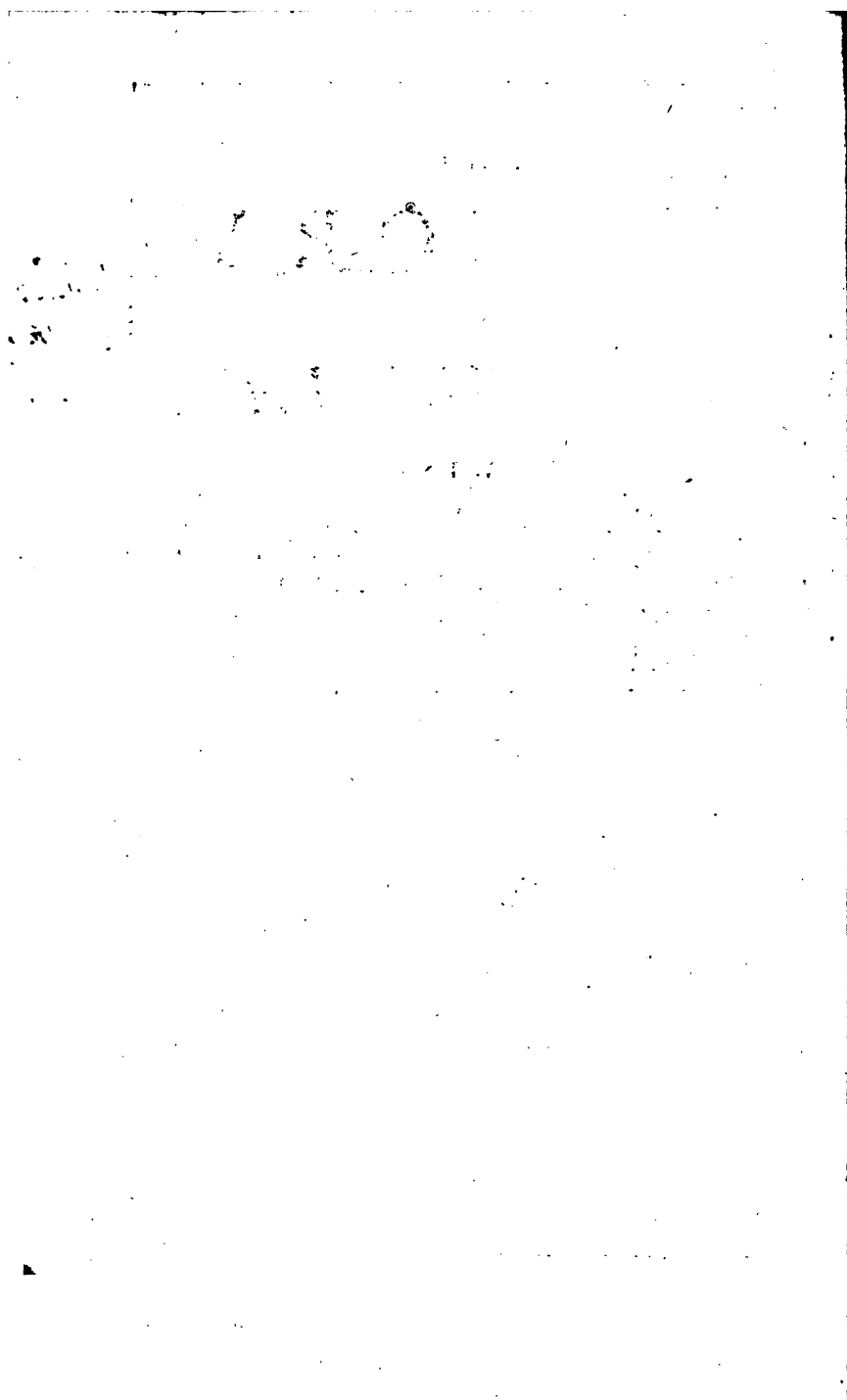
SHEWING
Its ORIGIN and PROGRESS; how, and
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thereupon: And of the METHOD to be
observ'd in Studying the same.

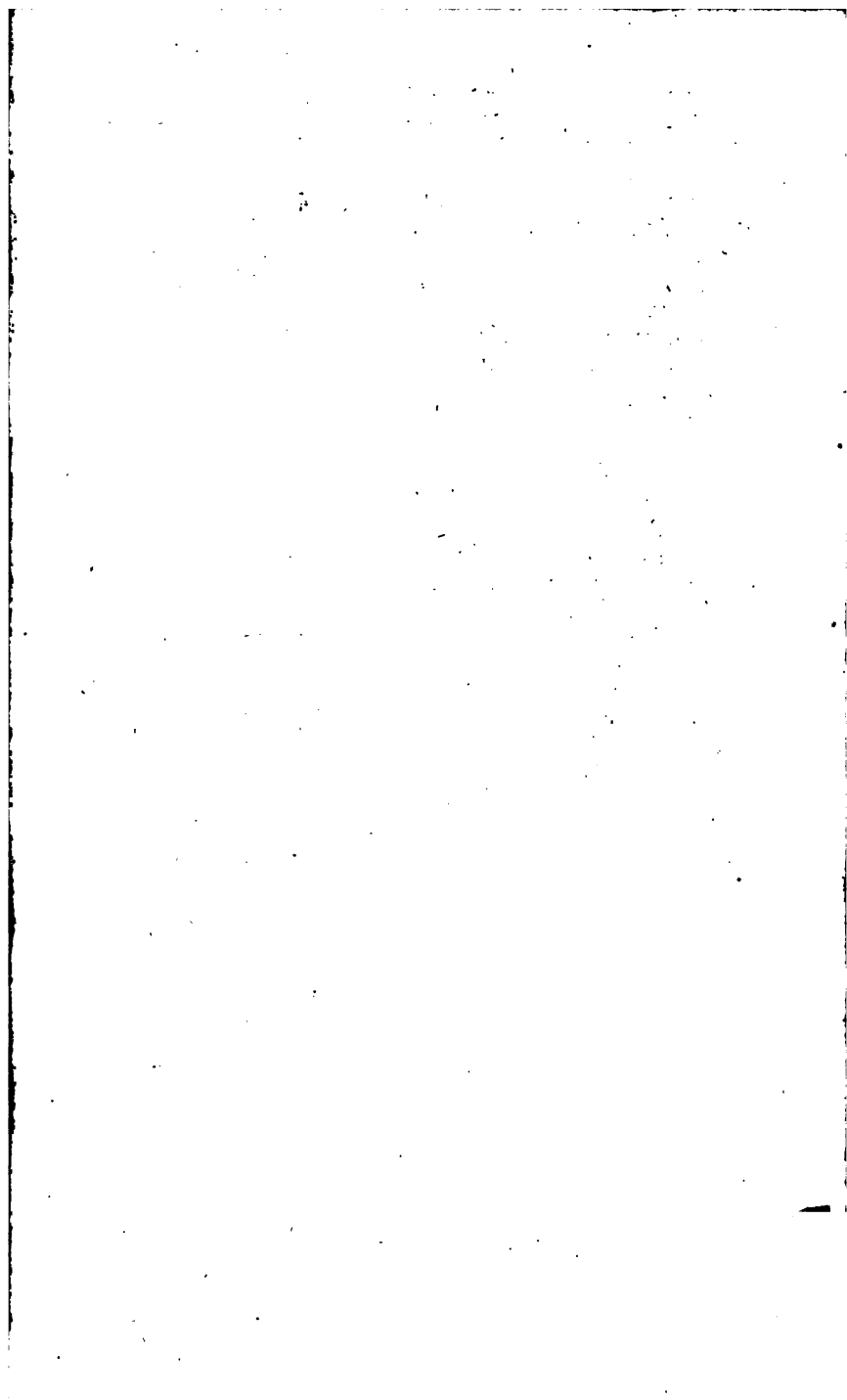
Written originally in *French*,
By M. CLAUDE JOSEPH de FERRIERE.

To which is Added,
Dr. DUCK's Treatise of the Use and Authority
of the CIVIL LAW in *England*.

Translated into *English*,
By J. B. Esq;

L O N D O N,
Printed for D. BROWNE, at the *Black-Swan*, and
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The CONTENTS.

O <i>F the different Forms of Government in Rome.</i>	Page 1.
<i>Of the Roman Law under the Regal Government.</i>	2
<i>Of the Free State of Rome in its Infancy, and the Creation of Consuls.</i>	6
<i>Of the Creation of Tribunes of the People.</i>	8
<i>Of the Decemviri, and Law of the Twelve Tables.</i>	11
<i>Of the Consequences that attended the Law of the Twelve Tables.</i>	12
<i>Of the Laws.</i>	14
<i>Of the Plebiscita.</i>	15
<i>Of the Interpretation of the Lawyers.</i>	16
<i>Of the Prætor's Edicts.</i>	19
<i>Of the Roman Law under the Emperors.</i>	22
<i>The Succession of the Emperors to Justinian.</i>	24
<i>Of the Emperor Justinian.</i>	34
<i>Of the Roman Senate.</i>	37
<i>Of the Senatus-Consulta.</i>	42
<i>Of the Lawyers Answers.</i>	48
<i>Of the most celebrated Roman Lawyers.</i>	51
<i>Of the Law-Books before Justinian's Time.</i>	64
<i>Of Justinian's Code.</i>	68
<i>Of the Digests or Pandects.</i>	73
<i>Of Justinian's Institutes.</i>	85
<i>Of the second Edition of Justinian's Code.</i>	93
<i>Of Justinian's latter Constitutions, called Novels.</i>	96
<i>Of the Law observ'd in the East, after Justinian's Death.</i>	103
<i>Of the Law observ'd in the West, after Justinian's Death.</i>	105
<i>Of the Use of the Roman Law in France.</i>	107
<i>The Decretal Epistle Super-specula explain'd.</i>	115
<i>The Sixty-ninth Article of the Ordonnance of Blois explain'd.</i>	124
<i>Of the Excellency of the Roman Law.</i>	130
<i>Of the most celebrated Interpreters of the Roman Law.</i>	143
<i>Of the Dispositions required for the Study of the Roman Law.</i>	157
<i>Of the Method to be observ'd in studying the Roman Law.</i>	161
<i>Of the Quotations and Abbreviations.</i>	166
<i>Of the Use and Authority of the Civil Law in the Kingdom of England.</i>	
<i>Of the History of the Origin of the French Laws.</i>	



To the Honourable

Charles Colyear, Esquire.

S I R,



IVE me leave to introduce to the Honour of your Acquaintance a *French* Author, in Plain *English* Cloaths; which, tho' not quite so Genteel, render him more Familiar and Useful in this

A 3

Coun-

DEDICATION.

Countrey, than he can be in his Foreign Drefs.

He and I, Sir, join in inviting you to the Study of the *Civil Law*; for which you are qualified by all the Advantages of a liberal Education, bright Natural Parts, and a Maturity of Judgment rarely to be met with at your Age.

'Tis in this Treasure, and no where else, you may find the most perfect Collection of Natural Reason and Equity, applied to all the various Transactions and Intercourses between Man and Man: And therefore, all Gentlemen, tho' they

DEDICATION.

they do not design to make it their Profession, ought to understand so much of the *Civil Law*, as may serve for a Rule to govern their Actions.

You are, Sir, already Considerable by your Birth and Fortune, and 'tis in your own Power to make your self much more so, by applying some part of your Time to the Study of a Science, the Usefulness and Excellency whereof is universally allow'd.

Forgive me, Sir, the Freedom I have taken in furnishing you with a Guide to shew the Way, and make your Entrance

DEDICATION.

easy ; since I assure you, it proceeds from my Natural Inclinations to serve, and earnest Desire to see you both Great and Happy. I am

SIR,

Your most Obedient, and

Most Humble Servant,

John Beaver.

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THE

CONTENTS.

CHAP. I. OF the different Forms of Government in Rome.	Page 1
CHAP. II. Of the Roman Law under the Royal Government.	P. 2
CHAP. III. Of the Free State of Rome in its Infancy, and the Creation of Consuls.	P. 6
CHAP. IV. Of the Creation of Tribunes of the People.	P. 8
CHAP. V. Of the Decemviri, and Law of the Twelve Tables.	P. 11
CHAP. VI. Of the Consequences that attended the Law of the Twelve Tables.	P. 12
CHAP. VII. Of the Laws.	P. 14
CHAP. VIII. Of the Plebiscita.	P. 15
CHAP. IX. Of the Interpretation of the Lawyers.	P. 16
CHAP. X. Of the Prætor's Edicts,	P. 19
CHAP. XI. Of the Roman Law under the Emperors.	P. 22
CHAP. XII. The Succession of the Emperors to Justinian.	P. 24
CHAP.	

The C O N T E N T S.

CHAP. XIII.	<i>Of the Emperor Justinian,</i>	p. 34
CHAP. XIV.	<i>Of the Roman Senate,</i>	p. 37
CHAP. XV.	<i>Of the Senatus-Consulta,</i>	p. 42
CHAP. XVI.	<i>Of the Lawyers Answers,</i>	p. 48
CHAP. XVII.	<i>Of the most celebrated Roman Lawyers,</i>	p. 51
CHAP. XVIII.	<i>Of the Law-Books before Justinian's Time,</i>	p. 64
CHAP. XIX.	<i>Of Justinian's Code,</i>	p. 68
CHAP. XX.	<i>Of the Digests or Pandects,</i>	p. 73
CHAP. XXI.	<i>Of Justinian's Institutes,</i>	p. 85
CHAP. XXII.	<i>Of the Second Edition of Justinian's Code,</i>	p. 93
CHAP. XXIII.	<i>Of Justinian's latter Constitutions, called Novels,</i>	p. 96
CHAP. XXIV.	<i>Of the Law observ'd in the East, after Justinian's Death,</i>	p. 103
CHAP. XXV.	<i>Of the Law observ'd in the West, after Justinian's Death,</i>	p. 105
CHAP. XXVI.	<i>Of the Use of the Roman Law in France,</i>	p. 107
CHAP. XXVII.	<i>The Decretal Epistle Super-Specula explain'd,</i>	p. 115
CHAP. XXVIII.	<i>The Sixty ninth Article of the Ordinance of Blois explain'd,</i>	p. 124
CHAP. XXIX.	<i>Of the Excellency of the Roman Law,</i>	p. 130
CHAP. XXX.	<i>Of the most celebrated Interpreters of the Roman Law,</i>	p. 143
		CHAP.

The CONTENTS.

- CHAP. XXXI. *Of the Dispositions requir'd for the
Study of the Roman Law,* p. 157
- CHAP. XXXII. *Of the Method to be observ'd in
studying the Roman Law,* p. 161
- CHAP. XXXIII. *Of the Quotations and Abbre-
viations.* p. 166
-

OF the Use and Authority of the Civil Law in
the Kingdom of England. i



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THE
HISTORY
OF THE
ROMAN LAW.

INTRODUCTION.



T is an established Maxim, that no Man can arrive at a perfect Knowledge of any SCIENCE, without having first examin'd its *Rise and Progress*: But tho' this generally holds true, it is in no Case so naturally applicable, as in the Study of the *CIVIL LAW*: Whether it be owing to the great Variety of *Laws* made upon the same Subject, or the different Qualifications of the *Legislators* who have govern'd *Rome* at several times.

FOR,

For, notwithstanding Justice be in it self Im-
mutable, the Administration of it is subject to
great Changes; the *Laws* themselves, which
ought to encourage this Vertue in Mankind, are
the very Cause thereof: The Disputes which
generally give birth to *Laws*, never happen
all at the same time; nor is it in the Power
of Man, to foresee all the Consequences of those
General Rules they prescribe, or to adapt them
to every Case that may arise; from whence it
follows, that so profound a Science as the *Law*,
could not possibly be brought to that Perfection
in which we now see it, but by Degrees, and
Length of time. Besides, as our Understanding
of the *Roman Law*, depends very much upon
knowing what kind of Government the *Romans*
were under at the Time of their making; 'tis
plain, nothing can more facilitate that Study,
than to be acquainted with the Rise and Pro-
gress of the *Law*.

THIS Book therefore, in which I have careful-
ly collected from the Ancients, all that is re-
markable or material on this Subject, and which
lies dispers'd, or rather buried in a vast Number
of Places, will serve those that apply themselves
to the *Civil Law*, as an Introduction; and at
once make them Masters of several Things,
which are apt to discourage Beginners for a time.

THIS

THIS *History of the Roman Law*, is so closely link'd to that of the different Forms of their Government, that I flatter my self, it will be no less curious than useful to such as have already any Knowledge of either; it will be highly pleasing to them to have a Prospect of both as it were at one View. and to recollect the *Laws* themselves by comparing them with their Origine. In a Word, it will enable them to form a just Idea of what they had before but a confus'd Notion; and to dive into the Bottom of those Causes, of which they were before contented to admire the Effects only.

THE Force of the *Roman Arms*, and Extent of their Empire, made them formidable throughout the whole World; but how much more were they so by the Wisdom of their *Laws*? Their very name, methinks, commands Respect, and every Work that treats of them, for the sake of its Subject, has a kind of Right to a favourable Reception from the Publick.

BUT I have not confin'd my self to treat only of the manner in which the *Roman Laws* were first establish'd; I propose to shew what success the Body of *Law* compos'd by *Justinian*, had after his Death in the Eastern and Western Empires.

IN the next Place, the Love of Truth engages me to shew the Excellency of the *Civil Law*, and how far 'tis receiv'd in this Kingdom: Nor would it have been just, to write the History of the *Law*, without giving it the Praises it deserves; and

and shewing that most of the Maxims upon which our *Common Law* is grounded, are borrow'd from it.

As haughty a People as the *Romans* were, they made no scruple to own their Obligation to the *Grecians*, for the *Laws* they had from them. How then can we admire and follow the *Romans*, and not imitate their Gratitude?

To make this Work the more compleat, I have added, the true Explanation of the famous Decretal Epistle *Super-specula, titulo Decretalium Privilegiis*; and that of the Sixty ninth Article of the Ordinance of *Blois*, concerning the Prohibition to teach the *Civil Law* in the University of *Paris*; which was a Point, I thought, had not been hitherto sufficiently cleared up, tho' it seem'd to deserve the Curiosity and Notice of the Learned.

LASTLY, The Conclusion of this History, will direct young Students how to apply themselves usefully to the Study of the *Civil Law*, so necessary for those who are design'd to defend Causes or determine Disputes; and also shew, what Dispositions they ought to have, who make this Study their Choice.

HAVING thus given the Reader a View of the Plan of this Work, and inform'd him what it is to contain, I shall enter upon the *History of the Roman Law*, and pursue that People through all their different Forms of Government.



C H A P. I.

Of the different Forms of Government in R O M E.



THE *Roman Law*, having an inseparable Relation to the different Constitutions of the Nation to whose Wisdom it is owing; one cannot arrive at a full and exact Knowledge of it, without being first well acquainted with the several Kinds of Government to which the *Roman People* were subject. This is what I shall endeavour to unfold, after having briefly touch'd upon the Origine of that Empire, which from a very slender Beginning, came in time to be the Greatest and most Powerful that ever was known.

Rome, was so called from ROMULUS; who, in the Eighteenth Year of his Age, laid the Foundations of the City, round about *Mount Palatine*. This was Seven Hundred and Fifty Years before the Nativity of Christ; reckoning Three Thousand Two Hundred and Fifty three Years from the Creation of the World; upon the Twenty first of *April*: A Day celebrated by the Shepherds in Honour of the Rural Goddess *Palilia*.

The *Roman People*, who at first were under the Dominion of ROMULUS, became afterwards subject to Three different Forms of Government.

The First was the *Regal Government*; which lasted Two Hundred and Forty Years, under Seven Kings, viz. ROMULUS, NUMA-POMPILIUS, TULLIUS-HOSTILIUS, ANCUS MARTIUS, TARQUIN

Of the Roman Law

the First of that Name, **SERVIUS TULLIUS**, and **TARQUIN** the **PROUD**.

After the Expulsion of the last King, *Rome* erected it self into a Republick, and pass'd into a quite different kind of Government, that of *Consuls*, who were annually chosen. This Consular State lasted about Five Hundred Years, from the first Consulate of *C. Junius Brutus*, to the time of *Augustus Caesar*.

The Third Form of Government was *the Imperial*, under the Emperors ; which continued Five Hundred and Fifty eight Years, from the Beginning of the Reign of **AUGUSTUS**, to that of the Emperor **JUSTINIAN** ; to whose successful Endeavours, we are beholden for the Compilation of the Body of the Civil Law, in the Order it has been transmitted to Us.

C H A P. II.

Of the Roman Law under the Regal Government.

NO sooner had **ROMULUS** fix'd his Authority, by an Alliance which the *Sabines* were forc'd to contract with him, but he divided the People into Three Parts, which were called *Tribes*, and each *Tribes* into Ten *Curie* ; and appointed Priests to offer Sacrifices to the Gods. But the most remarkable Act of his Reign, was the Establishment of that august Assembly, which afterwards became the most awful of all Tribunals ; I mean the *Senate*, which he chose out of the most Ancient and Venerable Citizens, to assist him in his Administration.

This *Senate* at first consisted of a Hundred only ; but their Number was afterwards much increased.

To these, he committed the Care of the most important Affairs of State, but with certain Restrictions. There were three Things, which he thought not proper to submit to their sole Determination ; The Creation of *Magistrates*, the making *Peace* and *War*, and *Enacting of Laws*. These he refer'd to be debated and decided in a full Assembly of the People.

Nor

Nor did ROMULUS ever after the Establishment of this Great Council, attempt to make any Law, before he had first concert'd it with them, and afterwards revis'd it in a General Assembly.

NUMA POMPILIUS, who succeeded *Romulus*, turn'd his Thoughts chiefly to settling Religion; his creating of Priests and Augurs, &c. were the Effects of his Zeal for the Establishment of exterior Worship. He made many good Laws, appointed Punishments for Homicides, and regulated the Ceremonies of Funerals. Whatever he propos'd, was eagerly embrac'd by the People; whose Credulity and Superstition he knew so well how to turn to his own Advantage, that he made them believe, he had frequent Interviews with the Nymph *Egeria*, and did nothing but by her Inspiration.

Military Discipline was the chief Study of TULLIUS HOSTILIUS.

ANCUS MARTIUS applied himself particularly to adorn and embellish the City.

TARQUINIUS, afterwards Sirnam'd PRISCUS, did likewise little or nothing towards strengthening or settling the Authority of the Laws. He only invented the Ornament of Distinction, which the Senators ever after preserv'd as a Mark of Superiority, the *Laticlave*; which was a Gown or *Tunique*, sew'd about the Edges with pieces of Purple like great Nails.

SERVIUSTULLIUS did not only cause the Laws of ROMULUS and NUMA, which time had almost abolish'd, to be reviv'd, but enacted himself several new ones, which were transcrib'd into the Law of the *Twelve Tables*.

He was at abundance of Pains to dive into the Knowledge of every Man's Estate and Circumstance, in order to make him contribute proportionably to the Necessities of the Government: And this was the Reason of his instituting the *Confus*, or general Review of the People every fifth Year; when all were oblig'd to give in a faithful Particular of
B 2
their

their Estates : Which Review was at first made by the *Kings* themselves, afterwards by the *Consuls*, and lastly by the *Censors*.

The Laws, according to the Rules prescribed by *ROMULUS*, were proposed by the Kings to the Senate, whose Approbation was requisite ; and then carried down to be confirm'd by the Votes of the People, divided into Thirty *Curie* : From whence those Laws so pass'd, were called *Leges Regales & Curiales*.

But after the People came to be divided by *SERVIVS TULLIVS* into Six Classes, and a Hundred Ninety four Centuries, the Laws got the Name of *Centuriales*.

The first Class or Division, which was compos'd of the Richest and Principal Citizens, consisted of Fourscore and Eight Centuries ; and as it was far the most Numerous, their Consent only was sufficient, unless they happen'd to be divided in Opinion.

After the Death of *Servius Tullius*, *TARQUIN* the *PROUD* ascended the Throne, whose predominant Qualities were Pride, Inhumanity and Avarice. He subdued *Rome* intirely to his Tyranny : He govern'd with a Rod of Iron ; and his Will, howsoever unjust, was the only Law.

He utterly extinguish'd the Laws of *Servius Tullius*, and neglected to enforce the Execution of those enacted by his Predecessors, even of *Romulus*. He held the ancient Custom of advising with the Senate and People in such Contempt, that he hearkned only to the Advice of Confidants and his own Caprice. His immeasurable Desire of Ruling absolutely, blinded him to all other Views, and never suffer'd him to examine whether his Commands were agreeable to the Rules of Justice : So that having neither Goodness enough to govern reasonably, nor Spirit enough to make his Tyranny obey'd, the People waited only for a proper Conjunction to shake off the Yoke of their Slavery, with which, the Death of the unhappy *LUCRETIA* soon supply'd them.

It is well known how *Sextus Tarquinius* this Tyrant's Eldest Son surpriz'd her alone, what Threats and Violence he offer'd, to force her in some measure to condescend to his Criminal Desires : But she had not Courage enough to survive the Affront. She called for her Relations ; and having
recited

recited to them her Agonies and Misfortune, and recommended the Revenge of the Injury done her, she stabb'd her self with a Dagger.

So remarkable a Death, the Body of this unfortunate Lady which was expos'd to Publick View, and the Harangue *Brutus* made to the People, excited in them so much Pity and Indignation, that they abandon'd themselves wholly to Rage, and meditated nothing else but Arms and Revenge : And *Brutus* improv'd the Occasion so well, that *Rome* set it self at Liberty, and chang'd the Monarchical into Republican Government ; and a Law was made, for perpetual Banishment of the Kings of *Rome*. This Law was called *Tribunitia*, because it was made at the Instigation of the same *Brutus*, who was then Tribune of the Cavalry.

But before I end this Chapter, I must take notice, *First*, that under this King's Reign, *Sextus Papyrius* had collected the Laws of the preceding Kings, and digested them into a Volume, which was called, *Jus Civile Papyrianum*.

Secondly, That notwithstanding the Aversion of the *Romans* to Kingly Government, at the time of *TARQUIN's* Expulsion, they did not repeal the *Regal* Laws, but the greatest part of them grew Obsolete ; and such as retain'd any shadow of Authority, were made use of only as Usages : So that it is a Mistake to assert, that the *Tribunitian* Law repealed the *Regal* Laws ; for the Word *Exsulescere*, which we meet with in the Law, 2 §. 3 ff. de Origine Juris, does not signifie to Abolish or Repeal, but to grow Obsolete or into Disuse.

But in order to let us into the true meaning of the Law in this Paragraph, we must read it thus, *Exactis deinde Regibus Lege Tribunitia, omnes Leges hæ exoleverunt* ; with the Comma after the Word *Tribunitia*, and not after *Regibus*, as some will have it. In short, *Brutus* was so far from abolishing the *Regal* Laws by the Law *Tribunitia*, that many Authors affirm, the Law *Tribunitia* restor'd the Laws of *Servius Tullius*, which *Tarquin* the Proud had abrogated.

However this be, the *Regal* Laws, some time after the Establishment of the Republican Government, ceased to be in use ; nor are there the least Footsteps of any of them to be found in the Books of the *Roman* Law.

C H A P. III.

Of the Free State of ROME in its Infancy ; and
the Creation of Consuls.

TARQUIN the PROUD being thus Banish'd from Rome, which happen'd in the Year Two Hundred Forty four after the Building of the City, the State of Affairs and Government were quite changed. In the Place of Kings, whose Authority had degenerated into Tyranny, they chose Two Magistrates, for the Administration of Publick Affairs ; whose Power, tho' very great, was not unlimited, nor inconsistent with their new-purchas'd Liberty.

These Two Magistrates were called *Consuls*, à *Consulendo* ; because it was incumbent upon them to take care of the Republick ; or because they were oblig'd to give Advice for its good Government, and not to Rule according to their own Fancy.

The first Consuls were *Junius Brutus* and *Tarquinius Collatinus*, Husband to *Lucretia* ; but the latter was forced not long after, to resign his Place, and go into voluntary Exile, only for the sake of bearing the Name of *Tarquinius*, which became odious to the People ; and because they had made a Law, not to suffer any of that Name to live in Rome.

Thus the Sovereign Power was divided between Two, to prevent the ill use a single Person might make of it. Besides the Limitation of their Office to the Term of a Year, did not give them room to imagine they might act without Controul ; tho' they were in full Possession of all the exterior Ornaments used by the Kings, as the *Purple Robe*, the *Twelve Lictors*, the *Fasces*, and other Marks of Distinction, But to avoid giving Jealousie to the People, who might think their Condition rendred Worse rather than Better, by having Two Masters instead of One, they agreed to govern alternately by Months ; and that he only who was in Power, should be attended by the *Lictors* and *Fasces*, with the *Axes* ; the other, by One Gentleman-Usher only, and Twelve *Lictors*, without either *Axes* or *Fasces*.

But

But altho' these *Magistrates* had all the outer shew of the ancient *Regal* Majesty, their Power was not the same. Those had no other Law than their own unbounded Wills, and acknowledg'd no Superior : On the contrary, the *Consuls* were only, *Depositaries* and *Guardians* of the Laws, whose Duty it was to see them duely put in Execution. It belong'd to them to call together the Assemblies of the People and *Senare*, but not to conclude any Thing, without the *Deliberations* of the one, or *Decrees* of the other. And they were oblig'd to render an Account of their Administration as soon as it ended.

But notwithstanding all the wise Precautions the People of *Rome* could take, to establish their new-gotten Liberty ; the good Effects of it were soon interrupted, by some enterprizing Citizens, supported by the *Magistrates* ; which gave occasion for the making several New Laws, to retrench the *Consular* Power. Thus the Law *Valeria* was enacted, and took place from the Year 244. by which Liberty was given of appealing from the *Magistrate* to the People *. After that, in the Year 261, the Law *Sacrata* was made, concerning the Election of *Tribunes* of the People, to protect them from the Oppression of the *Nobility* †. And in the Year 291, the Law *Terentia* was propos'd, to keep the *Consuls* Authority, which was grown exorbitant, within Bounds ; but it was oppos'd by the *Senators*, because the Right of Law-making did not belong to the People ‡.

As for the *Regal* Laws, during the first Seventeen Years of the *Free State*, they were no otherwise regarded than as Ancient Usages ; nor had all of them even that Force, but such only as were reputed the most Just and Equitable.

All this time, there was no fix'd Law at *Rome* ; which occasions that Obscurity we observe in the History of the Civil Law, from the Beginning of the *Consular State*, to the Time of forming the Law of the *Twelve Tables*.

* Livy, Book 2. Chap. 8.

† Book 2. Chap. 32.

‡ Book 3. Chap. 8.

C H A P. IV.

Of the Creation of Tribunes of the People.

THE *Consuls* themselves aiming at Arbitrary Government, encourag'd the *Patricians* to usurp a Tyrannical Power over the *Plebeians*, and invade their Liberty daily by new Attempts. The People, on the other hand, being no longer able to support the extravagant Pride and Insolence of the Nobles, nor suffer the insatiable Avarice of the Rich, who oppress'd them to death with excessive Usury, thought of nothing else, but how they might shelter themselves from all Violences, and throw off the Yoke of their Slavery and heavy Calamities.

Wherefore, about the Year 261, under pretence of marching against the *Æqui* and *Sabines*, getting Arms, they retir'd to *Mons Crustumerinus*, afterwards call'd *Sacer*, from the Law *Sacrata* there made. Upon this, the Senate having held several Meetings and Consultations about the Retreat of the Commons, resolv'd to Commission some of the most Reverend and Popular Senators to treat with the People; of which number was *Appius Menenius*, who address'd himself to them in this manner. *Once upon a time the Members and Parts of Man's Body fell out with the Belly; alledging, That they were all forced to toil and moil to provide Necessaries for the Belly, whilst that lived Idle, and did nothing but enjoy its Pleasures: Whereupon, they resolv'd the Hands should not lift the Meat to the Mouth, nor the Mouth receive, nor yet the Teeth chew it; by which means, whilst they endeavour'd to famish the Belly, they themselves, and the whole Body were all starv'd, for want of the Nourishment they received from it.* In the same manner, said he, the Senate and People, making but one Body, must perish by this Disagreement; as they will live and flourish, whilst they maintain a mutual Friendship and good Understanding.

The People seem'd highly satisfy'd with his Story and home Application, but being desirous of securing themselves against the future Attempts of the Senators, and to put a stop to the career of their Violences, would not agree to de-
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part and return to the City, till the Senate had consented to the creating of five new Officers yearly, out of their own Body, with the Title of *Tribunes*, whose sole Power should be to give Relief to such *Plebeians* as were injur'd, and suffer none to be oppress'd by the *Senate* or *Consuls*.

The *Law Sacrata*, by which these new Magistrates were created, was made on *Mons Crustumrinus*, in the Year 261: By it, the Persons of the Tribunes were made Sacred, and none was to offend them upon Pain of Death.

Their Authority was very considerable; they might assemble the People whenever they pleas'd, and summon any Magistrate of what Degree or Quality soever, to appear at their Tribunal. No *Senatus-Consultum* was of force, till it had their Confirmation. They were not allow'd to sit in the Senate-House, but stood without; where they examin'd all Decrees pass'd within, and either gave their Approbation, by signing them with the Letter T, or rejected them with this Word, *Veto*; without being oblig'd to give any Reason for their Refusal.

At first they were elected only out of the Body of the People; but afterwards the *Senators* and *Patricians* were admitted to that Office, and accounted it a great Honour to be of their Number; which, in the beginning was *Five*; but that being found too small for the Business, was afterwards increas'd to *Ten*. [*L. 2. §. 2. ff. de Origine Juris.*]

The Senate quickly perceiving the Tribunes Design was to divide the Government, neglected nothing to elude their Authority, and render it useless: And the People, pursuing their Drift of sharing in the Management of Affairs, enacted several Laws, which they called *Plebiscita*, without acquainting or consulting the Senate: Which Misunderstandings were often the cause of dangerous Seditions and Tumults in *Rome*.

The particular Meetings in which these *Plebiscita* pass'd, were assembled at the Command of the *Tribunes*, and called *Curiata Comitia*, to distinguish them from the General Assemblies of all the Citizens, when the Senate and whole Body of the People were summon'd to meet, by Order of the Consul, which were call'd *Centuriata Comitia*.

The *Senate* could by no means be induced to submit to the *Plebiscita*: They urg'd, that the *Tribunes* were created only to protect the People, and not to make Laws. On the other side, the People refus'd to acknowledge the Laws made by the Senate: Which Disputes, occasion'd many Conferences for settling a certain Law, that might be obligatory to all, and put Matters upon such a footing, that the meaner sort might be in no Danger, from the absolute Power which the Senators pretended to.

At the same time there arose a Dispute between the *Patricians* and *Plebeians*, whether the Republick should be govern'd by fix'd Laws, or the Authority of the Magistrate.

The Senators maintain'd, that the Power of the Magistrates join'd with the Law, was most advantageous to the Publick; that the Laws themselves were in many Cases unjust, and being inexorable, shut the door to all Mercy and Favour.

The People on their parts, pleaded, that the Laws were preferable to any Dependence upon the arbitrary Pleasure of a Magistrate; because as they are free from all Passion, whatever they prescribe must be Just, and ought to be regarded as the Dictates of Heaven: That notwithstanding they might seem to contain some unjust Decisions in particular Cases, that Inconvenience might be easily remedy'd, by giving them an equitable Construction.

The People's Argument prevail'd; so they fell to work to make a General Law, for a Rule to Great and Small.

C H A P. V.

Of the Decemviri, and Law of the Twelve Tables.

Notwithstanding the strong Opposition made by the Magistrates and Senators, whom nothing would satisfy but an Arbitrary Government, it was resolved about the Year of Rome 299, to send Embassadors into Greece, to bring such Laws from thence, as the Wisdom of that flourishing Nation had establish'd.

Upon their Return, in the Year 302, of the same Date, the People being assembled in *Centuries*, created Ten Magistrates, to whom they gave the Name of *Decemviri*. The Method they agreed upon, was, that they should govern the Republick by Turns for a Year, and have the same Power with that of *Kings* and *Consuls*.

He only who was in Power, had the *Fasces* and *Axes*, with other Consular Ensigns carried before him; the other Nine attended him as Assistants, having only an *Accensus* or sort of Beadle going before them.

At length, having with great Exactness made a Model, partly from such Laws as were brought from Greece, and partly from the Regal Laws and Customs of their own City, they were approv'd of, and by a *Senatus-Consultum* or Decree of the Senate, ratify'd by a *Plebiscitum*, order'd to be every where obey'd. This done, they were reduc'd into order, and engraven on Ten Tables of Brass, which were expos'd to publick View, in the most conspicuous part of the *Forum*, in the Year of Rome, 303.

All Parties seem'd extremely pleas'd with the Conduct of the *Decemviri* for the first Year; but something was still wanting to make the Laws compleat, and therefore the necessary Supplements were agreed to be made. In order to bring this Work to Perfection, they proceeded to a new Election of *Decemviri*; of whom, Seven were chosen out of the *Patricians*, and Three out of the *Plebeians*; whereas the whole Number of the former Ten were all *Patricians*, to the great Dissatisfaction of the People.

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12. *Of the Consequences that attended*

These added Two Tables of Law to the Ten that were made the Year before, which together went by the Name of the *Law of the Twelve Tables*, and were look'd upon as the Fountain of all Law both Publick and Private. *Cicero*, in his *Book de Oratore*, commends them highly, and says, *They are a Summary of all that is excellent in the Libraries of the Philosophers.*

C H A P. VI.

Of the Consequences that attended the Law of the Twelve Tables.

THE Laws contain'd in the Two last Tables, were in no Degree so favourable to the People as those before published; which was owing to the Contrivance of *Appius Claudius*, one of the *Decemviri*. Besides, every one of them laid hold of all Occasions to shew their Tyranny and Violence, having previously agreed and promis'd each other by Oath to be of one Mind, never to assemble the Senate or People, to retain the Power in their own Hands, and to be of equal Authority among themselves.

In a word, *Appius Claudius*, one of the *Decemviri*, fell desperately in love with *Virginia*, Daughter of *Virginius*; a *Plebeian*, at that time *Lieutenant* or *Legate* in the Army, on Mount *Algidum*. This Great Man, having no hopes of gaining her Affections, suborn'd one of his Clients to challenge her for his Slave, assuring him of success in his Cause, since the Trial was to be before him. As soon as *Virginius* heard the news, he hasten'd to *Rome*, where he found his Daughter condemn'd for a Slave; and despairing of any Relief, desir'd he might speak a Word with her, before he parted from her; which being granted, he led her aside, and stabb'd her to the Heart with this Expression, *Thou, Child, is the only way I have to set thee at Liberty.*

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The Disgust with which the People were prepossess'd by the violent and sanguinary Proceedings of the *Decemvirate*, made them look upon this unjust Sentence pass'd by *Claudius*, as an Invitation to extinguish and destroy their Power.

Accordingly, *Appius Claudius* was arraigned, as well as his Collegue *Spurius Oppius*, for correcting a Soldier immoderately. The rest of the *Decemvirate* banish'd themselves, and suffered their Estates to be confiscated.

In a Word, the Consular Government was restored; and from the Year 304, the People by the Law *Horatia* decreed, that such Laws as the Commons enacted, call'd *Plebiscita*, should to all intents and purposes have the Force of Law. By this Law it was provided, that whatever the People ordain'd separately from the Senate, should be of the same Force and Authority, as if it had been done in the *Comitia Centuriata*, or general Assembly.

But as there afterwards happen'd two other Disputes between the Senate and People, which occasion'd the latter to retire to Mount *Aventine*, and afterwards to the *Janiculum*; the Senate, to entice them to return, were again oblig'd to promise and consent that the *Plebiscita* should be received as Laws; which was settled by the Law *Publia*, in the Year 415, and by the Law *Hortensia*, in the Year 478.

Thus it appears, that after the Law of the Twelve Tables was establish'd, several Laws were made, not only by the whole Body of the People in their *Centuriata Comitia*, but many *Plebiscita* in their *Curiata Comitia*.

Moreover, the Interpretation and Determination of the Learned, bred another kind of Law, called *Jus Civile*, Civil Law, the Practice of the Bar, or the Customary Law.

About the same time, certain Forms were compos'd by the Lawyers call'd *Actiones Juris*, or Cases at Law, which were in a set and solemn Style, and to be follow'd in all Proceedings, as well as Acts of Court. Of these Forms or Cases at Law, *Appius Claudius* made a Collection, about the Year 473, which his Secretary *Gneus Flavius* publish'd, under the Title of the *Flavian Civil Law*: But as this Collection was imperfect, *Sextus Ailius* put out soon after a more compleat one, which went by the Name of the *Ailian Law*; [L. 2. §. 6. & 7. ff. *de Origine Juris*.] But the Emperors took away the necessity of keeping to the Words of those Forms,

Forms, still preserving that of bringing the Action proper to the Suit commenced. [L. 1. & 2. Cod. & Formul. & impetrat. Action. sublat.]

Several Regulations were also made in the time of the Republican Government, by the Magistrates, particularly the *Prators*; of which, after having first spoken something of the *Laws*, the *Plebiscita* and *Interpretation of the Laws*, the Reader shall have an Account.

CHAP. VII.

Of the LAWS.

THE Emperor JUSTINIAN, in the Fourth Paragraph of the Second Title of the first Book of his *Institutes*, defines a *Law* to be that which is enacted by the Roman People, upon the Requisition of a Magistrate of the Senatorian Order; as for instance, of a *Consul*:

During the time of the Republican Government, when the People were their own Law-givers, the Laws were propos'd by the Consuls, or some other Magistrate of the Senatorian Degree, in a General Assembly of the People, who either pass'd or rejected them, as they saw convenient.

The Method observ'd was this; When a Consul or other Magistrate of the Senatorian Order, moved to have a Law enacted, he first represented the Advantage it would bring to the Publick, and then read it openly on Three different Days to the People, that being Masters of the Heads of it, they might the more easily give their Opinions, when it came to be debated in the General Assembly, or if they foresaw any Inconvenience, inform the Magistrate who had the Management of it.

On those Three Days publick Notice was given, of the time the Law was to be put to the Votes of the People; which being come, the Magistrate demanded in these Words, *Velitis, Jubeatis Quirites?* That is, *Is it your Pleasure, O Romans, this Law shall pass or no?* If it went in the Affirmative, their Answer was *Uti Rogas*, *Be it as thou hast ask'd*.

ask'd. But if in the Negative, *Antiquo* was the Word, i. e. I forbid it.

Here we must observe, it was at first customary among the *Romans*, to give their Votes *vivâ voce*; but afterwards, to avoid Tumults, they proceeded in another manner, by giving every Voter two Tables, in one of which were these Two great Letters *U. R.* in the other a great *A.* one of which they deliver'd into a little Box for that purpose, according as they voted for or against the Law propounded.

If the Law pass'd, it was immediately engraven on Brass Tables, which were hung up at the Doors of their Temples and Corners of their Cross Streets. And it was a Rule constantly observ'd, that all Laws should be first expos'd to Publick View, and examin'd, that no Offender might escape unpunish'd, under pretence of Ignorance.

This was the Custom observ'd in making Laws, during the Republican Government, which also continu'd for some time under the Emperors, as I shall shew anon, when I come to treat of the *Roman Law* in their Reigns.

C H A P. VIII.

Of the Plebiscita.

A *Plebiscitum*, according to JUSTINIAN's Definition, in the Fourth Paragraph of the Second Book of his *Institutes*, is what is enacted by the People, without the Concurrence of the Senators, upon the Request of one of their own Magistrates, that is, of a *Tribune*.

How the *Plebiscita* were first introduc'd, and afterwards obtain'd the Force of *Laws*, is particularly set down in the Sixth Chapter.

As for the Difference between a *Plebiscitum* and a *Law*, it consists in Four Things. The First is, That a *Law* was made by the whole Body of the People; but a *Plebiscitum* was the Act of the People only, without the Knowledge of the *Patricians* and Senators.

16 *Of the Interpretation of the Lawyers.*

The Second is, That a *Law* had in it self a coercive Power, whereas a *Plebiscitum* had no such Power, but by the Authority of those Three Laws before mention'd.

The Third is, That a *Law* was made at the Request of some Magistrate of the Senatorian Order ; for instance, of a *Consul*, *Dictator*, *Decemvir*, or *Military Tribune* ; whereas a *Plebiscitum*, was made only at the Request of the Tribunes of the People, whose sole Business it was, to protect them from being oppress'd by the *Patricians* and *Senators*, as is said before.

The Fourth is, That a *Law* was made in the General Assembly of the People, call'd *Centuriata Comitia* ; but a *Plebiscita* pass'd in a Particular Assembly of the People, separate from the *Patricians* and *Senators*, which they call'd the Tribunes Assembly, or *Curiata Comitia*.

C H A P. IX.

Of the Interpretation of the Lawyers.

THE Obscurity of the Law of the *Twelve Tables*, occasion'd by its too great Conciseness soon appear'd, and made the Interpretation of the Lawyers necessary ; by which, being accommodated to the Practice of the Bar, and receiving a convenient Extent and proper Restrictions, 'twas thought it might be brought to answer Expectation.

For how Judicious and Sagacious soever a *Law-giver* may be, 'tis impossible but something will escape his Foresight. The Inconveniencies of Laws are rarely discover'd till they come to be put in Execution. Every one must agree, the Foundation of all Laws is Equity ; but the great Variety of Circumstances, are frequently the Cause that the Decisions of the Law have little of Equity in them, when they are to be applied to Private Cases. For as the Law, in regulating Matters goes commonly upon general Principles, and according to the usual Course of Things ; it easily happens, that a Law which in General is very Just, proves quite otherwise in Private Cases that may naturally arise.

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Therefore it is necessary the Law should be mitigated by Equity; which depends upon the Diversity of Circumstances: And this is the Reason the Laws are seldom in that Perfection the Authors of them intend, till they have receiv'd an Equitable Construction.

The Lawyers, whose Right it naturally was to interpret the Laws, by common Consent, undertook to explain those Passages of the Law of the *Twelve Tables*, which were either Obscure, or liable to a Double Acceptation. They agreed upon Rules for limiting the Disposition of the Law, where it was *Vague*, or too General, and giving it an Extent to Cases omitted; and how the Severity and Rigour of its Decisions, was to be temper'd with Equity: Which Method they have ever since follow'd, in explaining other Laws.

This Interpretation of the Lawyers, created a new kind of Law, so much approv'd of in Practice, that it was call'd *The Civil Law*, or *Usage of the Bar*.

It acquir'd the Force of Law, by the tacit Consent of all the Roman People; who were highly pleas'd to find their Lawyers so expert in reconciling the strict Literal Sense of the Laws, to the Practice of the Bar, and Rules of Equity.

The Credit of these Interpreters was so much the greater, as they were Men of Rank and Fortune; whose Wealth, join'd to their profound Learning in the Laws, very much contributed to advance the Dignity of their Profession, as well as their Personal Merit. So true it is, that the Gifts of Fortune will command and increase Respect; which bare Merit can but faintly attract.

In making their Interpretations, they follow'd these Two Rules. The first was, to adhere to the Design of the Law, rather than the Words in which it was conceiv'd. Thus, when the Law was conceiv'd in General Terms, the Interpreters sometimes confin'd it to Certain Cases, excluding all others. At other times, when the Law mention'd only Certain Cases, they extended it to others by parity of Reason; of which the Titles in the *Institutes* (*De Pupillari Substitutione* & *de Acquisitione per adrogationem*) furnish us with Examples; the Construction whereof, being drawn directly from the Spirit and Design of the Law, is with Justice regarded as the Law it self. [*Argumento Legi i. ff. de Legibus* & *L. 68. ff. de Verborum Significatione.*]

18 *Of the Interpretation of the Lawyers.*

The other Rule observ'd in Interpreting, was by the Rule of Equity, without regard to the Letter or Disposition of the *Law* : But this could not be done openly by the Interpreters, who had no Power to make or directly abrogate *Laws* ; so that they could not go against the *Law*, but under some Colour, indirectly, and by Inferences drawn from the *Law is self* ; by which they made it evident, that their Interpretation agreed with the Spirit and True Sence of the *Law* ; altho' it seem'd in some measure, contrary to the Terms thereof.

Of this manner of Interpreting the *Law*, there are some Instances in the Titles of the *Institutes* : *De Exheredatione Liberiorum*, & *De Inofficioso Testamento*.

One thing worth observing, in this last Way of Interpreting, is, That as it seem'd to be contrary to the most obvious Sence of the *Law*, it was not so readily receiv'd as the other, which was taken from the true Meaning of it : The Truth was, the *Lawyers* could not go against the Disposition of the *Law*, but under some Colour, that their Interpretation was agreeable to the Spirit of it.

Nor were the Interpretations of the *Lawyers* admitted, how Equitable soever, when they were so directly opposite and contrary to the formal Determination of the *Law*, as not to be reconcil'd by any Colour whatever : And therefore, when the *Law* it self was clear, and its Determination evident, the Authority of the *Lawyers* could not alter it ; because that would not be to Interpret, but in Effect to Abrogate the *Law* ; which is not to be done, but by the Supream Power. Besides, 'tis certain, Interpretations were not intended to destroy or elude the Force of the *Law*, but to preserve its Vigour, and quicken its Execution ; confining it, however, within the Bounds of Equity, according to the Diversity of Circumstances.

From what is said, it must be concluded, that when the *Law* is absolutely Unjust in its Principle, or becomes so by subsequent Circumstances, so that it can receive no Interpretation, without rendering it utterly useless ; there is no other Remedy, but to have recourse to the Sovereign Authority, which alone has the Power of giving Relief, by making another to Repeal it. And 'tis to this Case we must apply the Maxim, *That the Power of Interpreting the Laws, is reserv'd for him who has the Right of making them.* [L. 1. Cod. de Legibus.]

CHAP.

CHAP. X.

Of the PRÆTOR'S Edicts.

THE Interpretation of the *Laws*, did not only belong to the *Lawyers*, but the *Magistrates*; particularly to the PRÆTORS. Let us examine what was the first Occasion of their Creation.

The Two *Consuls*, who were chosen principally to fill the Magistracy, were afterwards often interrupted in the Exercise of their Civil Duty, by the Wars, where their Presence became indispensably necessary.

This was the Reason, that in the Year 387, the Republick created a Magistrate to supply the Place of the Consul, in the Administration of Justice. He was call'd *Prætor*, from *Præssendo* or *Præsumendo*: And because he partook of the most considerable Branch of the Consuls Office, had the Honour of being styl'd their *Collegue*; and was allow'd the same Ensigns of Distinction as the Consuls themselves.

At first, we must note, all Magistrates were call'd *Prætors*; afterwards, the *Generals of Armies*; and at length, the Name became peculiar to the *Magistrate*, whose Office it was to see Justice administred in the City of *Rome*.

After some time, there was another *Prætor* created; to decide Controversies between Foreigners, who resorted in great Multitudes to *Rome*: And to distinguish these *Magistrates*, one was call'd *Prætor Urbanus*, the other *Prætor Peregrinus*.

In short, as Business multiply'd, in proportion to the Increase of the Empire, the Number of *Prætors* was augmented at several times; and at last, they came to Twelve; who had each of them different Employments: One was call'd *Tutelaris*, another *Fidei-Commissarius*, and so the rest, according to the principal Object of their respective Duties.

The *Prætor* himself did not judge ordinary Matters, but only certain Causes, such as the *Restitution of Minors*: Things that were to be decided in the Common Form, he committed to Persons of his chusing, and prescrib'd Forms of Writs or Actions to the Complainants.

Tho' the Institution of a *Prætor*, was design'd rather to see former *Laws* put in Execution, than to make new Ones; yet, as he had the Power of amending the *Laws*, when they prov'd Defective, the People submitted to his Decisions; and his *Edicts*; had in some measure the Authority of *Laws*.

In reality, as the different Kinds of *Laws*, of which we have here unravel'd the Original, did not take in all Cases, nor were always Equitable in their Determinations; the People tacitly allow'd the *Prætors* to propose their *Edicts*, for mitigating the Rigour of the *Law*, and adding their Decisions, where the *Law* was not explicit. Hence it is, that the Emperor JUSTINIAN says, *The Prætor aids the Civil Law, supplies the Defects in its Disposition, corrects it, and even sometimes opposes its Decisions.* [Tit. 9. Instit. in principio.]

It is also in this Sense CATO is to be taken, when he says in his *Disticks*, *We must have Recourse to the Magistrate, when the Law is Unjust*; and that *the Laws themselves desire to be govern'd by Law*; that is, by the Judge who is the Voice and Interpreter of the *Law*.

Besides the *Prætors*, there were other Officers who had the Power of making *Edicts* and *Regulations*, in Explanation of the *Laws*: These were the *Ædiles Curules*, who had the Direction of all Publick Sales, the Care of the Watch, and cleansing of the Streets.

Of these, I shall only observe, they had their Names from *Ædibus*; being at first chiefly appointed to look after the Publick Buildings; but in process of Time, their Office was much enlarg'd, and the Regulation of the Market, Gaming-Houses, Publick Shews, and generally the whole Civil Government of the City, was put under their Care. They had the Addition of *Curules* from *Curru*; because they rode in Chariots, wherein there was a Chair adorn'd with Ivory, which denoted their being in the Rank of Chief Magistrates.

To return to the *Edicts* of the *Prætors*: Many of them yielding to Favour, or following their own Caprice, made several *Regulations* contrary to Equity, and the most receiv'd Maxims: Wherefore, in the Year 686, the *Plebiscitum Cornelianum*, oblig'd them to specify at their entering into the Office, the Method they intended to observe in administering Justice,

Justice, through the whole Course of their Magistracy; from which they could not deviate. And 'tis from these *Edicts*, the Law call'd, *Jus honorarium* & *viva vox Juris Civilis*, is deriv'd. [L. 7. §. 1. & L. 8. ff. de *Justitiâ* & *Jure*.]

The Force of these *Edicts* expir'd with the Prætor's Office, which was Annual, unless they were renew'd by their Successors. This Limitation to a Year, got them the Name of *Leges Annales*; and as the Prætors caus'd them to be wrote on a White Table, that was call'd *Album Prætoris*.

Among these, there are some *Edicts* so very Just, that they have been perpetuated as Laws; from which there is no departing, without an Offence to Equity and Right Reason.

It must, however, be allow'd, that the vast Number of them, diffus'd a great Uncertainty through the whole Law. To remedy which, the Emperor A.D.R.I.A.N. order'd *Julian*, a celebrated Lawyer, out of all these *Edicts*, to form a Perpetual one, which might serve the Prætors for a constant Rule, to guide them in their Judgments and Administration of Justice; and at the same time, took from them the Power of making *Edicts* for the future. [L. 3. §. 18. & 21. Cod. de *Veteri Jure enucleando*.]

This Perpetual *Edict* was divided into Fifty Books, containing the most just and useful Matters of all the Prætors *Edicts*; and several Roman Lawyers have made fine Commentaries thereon.

C H A P. XI.

Of the Roman Law under the Emperors.

THE Independant State and Liberty of the Romans, receiv'd its first shock from JULIUS CÆSAR, who laid the Foundation of a *new Monarchy*, in the Ruins of the *Republick*. He dispos'd of all as if he had been *sole Master*, got himself to be created *Perpetual Dictator*, against all Rule; and order'd the chief Marks of Sovereign Power to be given him.

But the Republick was utterly extinguish'd under AUGUSTUS, in the Year 731, from the Building of *Rome*; at which time, the Sovereignty was translated from the People to his Person. It was done by a Decree of the *Senate*; which, with the Consent of the *People*, reviv'd the *Law Regia*; first pass'd, as 'tis pretended, in favour of ROMULUS, and now renew'd in favour of AUGUSTUS. The Thing happen'd thus;

AUGUSTUS's Ambition made him passionately desirous of the Empire, but his Discretion directed him to pursue his Aims after such a manner, as not to forfeit the Good Will of the People. His Design was not only not to appear desirous of the Government, but to bring them to petition him to accept of it. In this View, he pretended to be unable alone to support the Weight of so great an Empire; but the more he strove to Disqualifie himself, the more eagerly the People begg'd he would take it upon him. At last he consented to the passing of the *Law Regia*, by which the Sovereignty was transferr'd to him; that is, the Right of Law-making, of commanding Generally, and forcing Obedience. This *Law* was always renew'd upon the Accession of the Emperors, to the Reign of VESPASIAN.

Thus the Power of *Law-making*, being transferr'd from the People to the Prince, by the *Law Regia*, we may observe, that in the Emperors Reigns, their Determinations had the same Authority as those of the People under the
Free

Of the Roman Law under the Emperors. 43

Free State; which produc'd a new Kind of Law, call'd, *The Edicts or Constitutions of the Emperors.*

But this was not brought about all at once; for notwithstanding the Sovereign Power had shifted from the People to the Emperor; He was too politic not to leave them some Marks of their late Freedom, in order, the better to establish and strengthen his Government. Wherefore, he kept up the Use of General Assemblies, in which he order'd all his *Edicts* to be publish'd, and that they should still retain the Name of *Laws*.

This faint Mark of the Ancient Liberty, displeas'd TIBERIUS, who succeeded *Augustus*: He suppress'd those Assemblies, under Pretence, that they could not be conveniently held, in Respect of the prodigious Increase of the People, which made it impossible for them to meet any longer in one Place.

This Contrivance he made use of to gain their Consent, that instead of advising with the *People* upon making new *Laws*, the *Senate* only should be consulted: But his Designs were easily seen through. Jealous of his own Power, he resolv'd not to leave the least Shadow of the Ancient Liberty; nor did he weaken, or rather abolish the Rights of the People, and increase those of the Senate, with any other View, than that all the Advantages and Prerogatives of absolute Sovereignty, should by degrees, at last center in Himself.

To this End, whenever he had a mind to publish a new *Edict*, he drew it up in his Privy Council, and then sent it to the Senate, who never fail'd to make a Decree according to his Pleasure: And by this imaginary Deference to the Judgment of the Senate, his *Edicts* got the Force of Law, without the Peoples Approbation.

His Successors practis'd the same Artifice, and got their *Edicts*, by an affected Moderation, pass'd for the real *Senatus-Consulta*; tho' in truth, they were no less the mere Will and Pleasure of the Emperor, in which the People had no Part.

But in after Ages, the Emperors publish'd several *Edicts*, without the Formality of the *Senate's* Approbation; most of which, they commanded, should go under the Title of *Imperial Constitutions*, in order to give the greater Lustre to their Sovereignty.

24 *The Succession of the Emperors to Justinian.*

In this manner, the Emperors *Edicts* establish'd a new kind of *Law*.

There are also many *Senatus-Consulta* and *Responsa Jurisconsultorum*, to be met with under the Monarchical Government of the Emperors, which are to be spoken of in this Place; but I think it proper, first to trace, as one may say, the Succession of the *Roman* Emperors; in order to give the Reader some *Idea* of the *Laws* made by them: In doing which, 'tis not my Design to write a History of them, but only to take notice of the Time they Reign'd; and, by the way, of the *Laws* they publish'd: Being convinc'd, that many Difficulties arise in the Study of the *Civil Law*, which cannot be resolv'd, without knowing when the *Laws* were made,

C H A P. XII.

The Succession of the Emperors to JUSTINIAN.

AUGUSTUS came to the Empire in the Year of *Rome* 711, in the manner describ'd in the foregoing Chapter. He made several *Laws*; of which the Chief are, The Law *Julia de Adulteriis*, for punishing *Adulterers*; which also prohibits in another Chapter the Alienation of *Lands* given in Dowry. The Law *Julia Peculatus*, to prevent the Misapplication of *Publick Money*. The Law *Julia de Residuis*, to oblige *Receivers* and *Managers* of *Publick Treasure* to Account. The Law *Julia de Ambitu*, against *Bribe-taking* for Employments in the Government. Many other *Laws* were made in this Emperor's Reign, which are too long to give an Account of here.

TIBERIUS succeeded him, in the Year of *Christ* 23, and Died in 38 of the same *Age*. He did nothing without first consulting the Senate; and by that means, gave the *Senatus-Consulta* the Force of *Law*.

The Succession of the Emperors to Justinian: 25

CALIGULA came to the Empire in the Year of Christ 39, and was Killed in 42.

The Emperor CLAUDIUS began his Reign in the Year 43, after Christ, and continued to the Year 55. He was the Author of many Laws, and Repeal'd the Clause in the Law *Papia Poppæ*, relating to the Marriage of Men of Sixty, and Women of Fifty Years old. Being dispos'd to marry his Niece *Agrippina*, Daughter of his Brother *Germanicus*; he caus'd a *Senatus-Consultum* to be made for that Purpose, that his Marriage might not be Unlawful.

NERO succeeded him in the Empire, in the Year of Christ 56, and Kill'd himself in 69. The *Senatus-Consultum Tribellianum* was made in his Time, with several other Laws; among which, One provides, *Ne quis alienum scribens Testamentum Legatum sibi adscriberet*, that The Writer or Maker of another Man's Will, shall not make himself a Legatee therein.

GALBA, OTHO and VITELLIUS, were received Emperors successively: The First held the Government but Seven Months and Twenty five Days; the Second, Three Months; and the last, Eight. So that by the shortness of their Reigns, they had no Opportunities to make many Laws.

VESPASIAN was chosen Emperor in the Year 71, and Reigned Nine Years. The Law *Falcidia*, and the *Senatus-Consultum Pegasianum*, were both made in his Time.

TITUS his Son, and Successor in the Empire, govern'd Two Years and Two Months, and Died in the Year 80.

DOMITIAN his Brother, who succeeded him, Reigned Fifteen Years, and was Kill'd in 97.

Upon his Death, NERVA was rais'd to the Empire, and Died Sixteen Months after, in the Year 99. He enacted many Laws; one of which, fully empower'd the Soldiers

26 *The Succession of the Emperors to Justinian.*

diers to make *Military Testaments* without any Formality of Law. [L. 1. ff. de Testament. Milit.]

The Emperor **TRAJAN**, his adopted Son, was his Successor. He Reign'd Eighteen Years, to the Year 118. This Emperor made some Laws, which are Instances of his Mildness and Justice: Among the rest, one obliges the Father who has been too severe to his Son, to emancipate him.

Before I proceed, it will not be amiss to inform the Reader, that none of the Emperors *Edicts*, from *Augustus* to *Trajan*, are to be found in *Justinian's Code*; which Collection, consists only of *Edicts* pass'd by those Emperors that came afterwards to the Empire; that is, from *Adrian* to *Justinian*.

ADRIAN, who was *Trajan's* Cousin-German, was declared Emperor in the Year of Christ 118. He Reign'd Twenty Years and Ten Months, and Died in 139. He made several Laws upon different Subjects: One was concerning the Property of *Treasure Trove*, (§. 39. *Instit. de rer. Divisione*.) He declar'd Children *Legitimate* that were born in the *Eleventh Month*. He forbid Masters to kill their Slaves. He granted the *Twelfth of the Estate*, to the Children whose Parents were condemn'd to Die. The *Perpetual Edict* was compos'd in his Reign by *Salvianus Julianus*, in the Year of Christ 132. As also, the *Senatus-Consultum Tertullianum* or *Tertullianum*; which provides, That the Childrens Estates shall revert to their Mothers, in Default of Heirs Descendants.

TITUS AURELIUS ANTONINUS, surnam'd **PIUS**, succeeded *Adrian*. He Reign'd Twenty two Years and Seven Months, and Dy'd in the Year of Christ 161. Among the many *Edicts* which he made, there is One prohibiting *Legacies*, *Parric nomine*: Upon which, see my *Commentaries* on the last Paragraph of the Title of *Legacies*, in the *Institutes*.

The two Brothers, **MARCUS AURELIUS**, surnam'd the **PHILOSOPHER**, and **LUCIUS VERUS** succeeded, and Reign'd jointly about Eighteen Years, *Lucius Verus* dying in the Year 170. After which, *Marcus Aurelius* Reign'd alone till 177; and from that Time, took his

The Succession of the Emperors to Justinian. 27

his Son **COMMODUS** for a Partner in the Empire; with whom he Reigned till the Year 181, in which he Died.

These two Brethren, *Marcus Aurelius* and *Lucius Verus*, are call'd in many *Laws*, *DIVI FRATRES*. [Vid. L. 3. ff. de Jure Fisci.] And there are many *Laws* of their making, reported in the *Code*.

The Emperor *Marcus Aurelius* also enacted several, whilst he sat alone in the Throne; many of which are to be seen in the *Code*, under the Title *Ne de Statu defunctorum*. He created a *Praetor* to determine Matters relating to Tutorship. In his Time, the *Senatus-Consultum Orphitianum* was made, which admits Children to succeed as Heirs at Law to their Mothers: Upon which, see my *Commentaries* on the Fourth Title of the Third Book of the *Institutes*.

After the Death of *Marcus Aurelius*, the Emperor **COMMODUS** Reign'd alone till the Year 193, in which he was Kill'd.

ELIUS PERTINAX was chosen Emperor in his Place, altho' he refus'd to accept of the Government. And tho' he was Kill'd Three Months after, there are several of his *Laws* reported in the *Code*.

JULIAN, Grandson of the Famous *Lawyer*, who was Author of the *Perpetual Edict*, succeeded *Pertinax*. He held the Empire but Two Months, yet some of his *Laws* are in the *Code*.

After him, **SEPTIMIUS SEVERUS** was elected Emperor, in the Year of Christ 193. He Reign'd Eighteen Years, and Died in 211. He was the Author of the *Senatus-Consultum*, which provides, *Ne pradia rustica aut suburbana minorum alienarentur sine decreto Magistratus &c.* ff. de rebus eorum qui sub Tutela, &c. Tho' this Emperor was Cruel and Irreligious, he had many Good Qualities: He took Pleasure in doing Justice, and had a particular Esteem for the celebrated *Papinian*.

28 *The Succession of the Emperors to Justinian.*

ANTONINUS CARACALLA and **GETA**, both Sons of *Severus*, were by their Father made *Associates* in the Empire : Which is the Reason we find some *Laws* in the *Code*, bearing the Names of *Severus* and *Caracalla*.

About a Year after *Severus* dy'd, *Caracalla* Kill'd his Brother *Geta*, in the Presence of his Mother *Julia*. He Reign'd alone Six Years, and was then Kill'd. We meet with several *Laws* of his making, dispers'd in the *Code*.

MACRINUS was proclaim'd Emperor, after the Death of *Caracalla*. His Reign lasted only a Year and Two Months, being put to Death in 219. None of his *Laws* appear in the *Code*.

VARIUS ANTONINUS HELIOGABALUS, was in *Macrinus*'s Life-time proclaim'd Emperor by the Army. He was reported to be the Natural Son of *Caracalla*. The Name of *Heliogabalus*, was given him, because he was a *Priest of the Sun*, which is denoted by that Word. His Reign lasted only Four Years, being Kill'd in the Year of Christ 213 : Yet there are some of his *Laws* in the *Code*.

AURELIUS SEVERUS ALEXANDER, was his Successor. He Reign'd Thirteen Years, and was Kill'd in 236. He was one of the Greatest and Best Princes in the World ; equally to be admir'd in War and Peace. His chief Care was to see Justice impartially administer'd. He was the *Author* of abundance of *Laws* ; the *Wisdom* and *Equity* of which, give us an *Idea* of his sound Judgment, and the *Uprightness* of his Heart. There are no less than Four Hundred and Sixty one in *Justinian's Code* ; upon which, *Monfieur de Chassanté* has made very Learned *Commentaries*.

After this Emperor, **MAXIMINUS**, some of whose *Laws* are to be seen in the *Code*, Reign'd Two Years, and was Kill'd in 238.

Then

The Succession of the Emperors to Justinian. 29.

Then follow'd GORDIANUS, who Reign'd One Month and Six Days. And after him, ABBINUS and PAPIENUS, elected Emperors by the *Senate*, Reign'd about a Year; and were then both put to Death by the *Soldiers*.

GORDIANUS, the Younger Son of the Emperor just mention'd, succeeded them. He govern'd Six Years, and Died in 245. There are some of his *Laws* in the *Code*.

MARCUS PHILIPPUS, who came after him, Reign'd about as long as his Predecessor. He Died in 250. Some of his *Laws* also, are to be found in the *Code*.

DECIUS, who succeeded him, Reign'd only Two Years, or thereabouts, and Died in the Year 252. The *Code* has some of his *Laws*.

GALLUS and VOLUSIANUS succeeded him: Their Reign, which lasted only Two Years, ended by their Death, in the Year 254. Some of their *Laws* are to be seen in the *Code*.

After these, VALERIANUS, and his Son GALIENUS Reign'd together Seven Years. In the *Code* we see several *Laws* under both their Names.

Valerianus being dead, GALIENUS Reign'd with VALERIANUS the Younger; but they were both Kill'd in the Year of Christ 269. There are some *Laws* in the *Code* of their making.

CLAUDIUS the Second, who succeeded them, Reign'd but Two Years, or thereabouts; yet we have some of his *Laws*.

After this, AURELIANUS Reign'd Six Years, and was Kill'd in 276. We find many *Laws* of his making, in the *Code*.

After

30 *The Succession of the Emperors to Justinian.*

After him **TACITUS** Reign'd Six Months; **FLO-RIANUS**, about a Year: And then **PROBUS** was rais'd to the Empire, who was Kill'd Six Years after, in 282.

Then follow'd **CARUS**, with his Sons **CARINUS** and **NUNNERIANUS**, whom he made Partners with him in the Empire. After about a Year, the Father being Slain, *Carinus* and *Nunnerianus* Reign'd together for a Year; and then were both Kill'd, in 285. There are some *Laws* in the *Code*, which have the Names of *all Three*; and others, those only of *Carinus* and *Nunnerianus*.

DIOCLETIANUS and **MAXIMIANUS HERCULIUS**, Reign'd together for the Space of Eighteen or Twenty Years: When *Diocletianus* Resign'd the Empire in favour of **CONSTANTIUS CHLORUS**, in the Year 304. *Maximianus Herculus* did the same Two Years after in favour of **MAXIMIANUS GALERIUS**.

Constantius was satisfy'd with *England* and the *Gauls*; and *Maximianus* had all the rest of the Empire for his Share. There are some *Laws* in the *Code*, made by *Diocletianus* alone; others by Him and *Maximianus*; and some by *Constantius*, *Maximianus* and *Galerius*.

CONSTANTINUS, Surnam'd the **GREAT**, succeeded his Father *Constantius*, the Year 308; and Reign'd several Years with the Emperors *Galerius*, and *Maxentius* Son of *Maximianus*, the First of that Name: After which, he govern'd the Empire alone for Thirteen Years, and Died in 339.

Constantine the Great, was the first *Christian* Emperor. After conquering *Maxentius*: He enter'd *Rome* in Triumph with a *Cross*; and labour'd to perswade the *Senate* and *People* to embrace the *Christian Faith*. There are abundance of his *Laws* in *Justinian's Code*; most of them relating to *Religion* and the *Catholick Faith*, *Bishops* and other *Ministers of the Church*, and *Places* dedicated to the *Service of God*. All which are uncontestable Proofs of this Emperor's great *Piety* and *Zeal*.

CON-

CONSTANTINUS the Younger, CONSTANTIUS and CONSTANS, all three Sons of *Constantinus the Great*, after their Father's Death, divided the Empire between them.

Constantinus the Younger, was Kill'd Three Years after; *Constans* in the Year 352: After which, *Constantius* enjoy'd the Throne alone, till the Year 365. There are in the Code some Laws, by the Names of all Three; some also have the Names of *Constantius* and *Constans*, and others that only of *Constantius*.

JULIANUS, call'd the *Apostate*, because he fell from the Faith of Christ, was Nephew to *Constantinus the Great*. He came to the Empire in the Year 365, and was Kill'd two Years after. There are some of his *Laws* extant in the Code.

As there are also of JOVIANUS who succeeded him, and Reign'd but Eight Months.

VALENTINIANUS and VALENS, Brothers, were made Emperors in the Year 367; and GRATIANUS, Son of *Valentinianus*, the Year following. Thus we find in the Code, *Laws* made by *Valentinianus* and *Valens*; and others by *Valentinianus*, *Valens* and *Gratianus*.

Afterwards, *Valens*, *Gratianus*, and VALENTINIANUS the Second, Reign'd together in 378. And there are several *Laws* by these Three Emperors Names in the Code. But *Valens* was Kill'd Five Months after. So the Two Brothers, *Gratianus* and *Valentinianus*, Emperors of the East, with THEODOSIUS, whom *Gratianus* associated in the Empire, Reign'd together, from the Year 382 to 386. We have several *Laws* made in their Reigns.

After the Death of *Gratianus*, *Valentinianus* the Second, *Theodosius*, and ARCADIUS his Son, Reign'd till 394. The Code has many *Laws* under their Names.

Then *Theodosius* with his Two Sons, *Arcadius* and HONORIUS; some of whose *Laws* we meet with in the Code, Reign'd till the Year 398, in which *Theodosius* Died.
After

32 *The Succession of the Emperors to Justinian.*

After his Death, *Arcadius* and *Honorius*, Reign'd together till 404; and made several *Laws*, whereof some are in the *Code*.

Theodosius the Great being Dead, *Arcadius*, *Honorius*, and **THEODOSIUS** the Younger Son of *Arcadius*, Reign'd jointly till 410. Then *Honorius* and *Theodosius*, to the Year 425. From which time, the latter Reign'd till 427: And then, taking **VALENTINIANUS** the Third, for a Co-partner in the Government, Reign'd till 452, in which he Died.

Here the Reader must be inform'd, that *Theodosius* the Younger, in the Year 428, made a *Code* call'd after his Name; in which he insert'd all his own *Edicts*, with those of *Constantinus*, and his Successors; the greatest part of which, were transcrib'd into *Justinian's Code*. The excellent *Notes* publish'd by *Gothofredus* upon the *Theodosian Code*, may be of very great Use towards the right understanding of all the *Constitutions*, from the Reign of *Constantinus*, to the End of that of *Theodosius* the Younger.

Valentinianus the Third, having held the Empire alone, for some time after the Death of his Collegue, Reign'd in Conjunction with **MARTIANUS** to the Year 457: From which, *Martianus* Rul'd alone till 460. In the *Code* we find several *Laws*, by *Valentinianus* the Third alone; others by him and *Martianus*, and some by *Martianus* only.

LEO succeeded *Martianus*: He govern'd the Empire with **MAJORANUS** till 463: After that with **SEVERUS**, till the Year 468. And then with **ANTHEMIUS**, who being Dead, he Reign'd alone till 475. There are *Laws* in the *Code* which bare the Names of them both, and some that of *Leo* alone.

LEO the Younger and **ZENO** Reign'd together till 476; and *Zeno* alone, till 494. We have *Laws* that go under both their Names, and others of *Zeno* only.

ANASTASIUS succeeded *Zeno*, and Reign'd Twenty seven Years, till 521. There are many of his *Laws* in the *Code*.

His

His Successor was JUSTIN, a Thracian by Birth, of low Extraction; having in his Youth been a Herdsman: When he grew older, he betook himself to the Wars; where, after passing thro' several Military Offices, he came to the Empire, upon the Death of Anastasius, in the Year 521. He Reign'd alone for above Six Years, and we find many Laws in the Code which go under his Name only.

In his Seventh Year, he adopted his Nephew JUSTINIAN, and made him his Co-partner in the Empire; which is the Reason, that in the Code we meet with several Laws under both their Names; but there are a vast Number of Justinian's alone; and even some made by him, after his Code was first Compos'd, which were added when he Corrected and Enlarg'd it: Particularly, his Fifty Digests; upon which, Monsieur Reguear has made an excellent Commentary in *Quatre*.

As Part of this Work was always design'd to give an Account of the several Materials, out of which Justinian compos'd the Body of the Civil Law; I thought it incumbent upon me, to enlarge a little upon his Life; and therefore have allow'd it a separate Chapter.

And indeed, I should be to blame to speak of so excellent a Work, without furnishing the Reader with some Notion of the Prince, by whose Care it has been transmitted to Us, in its present State.

C H A P. XIII.

Justinian, born in the Year of Christ 483, was the Son of Sabatius and Nigaurina, both of Obscure Families, but Justinian received much Honour from his Parentage; For his Mother was Sister to the Emperor Justin I. who notwithstanding his base Extraction, happily came to the Empire. By this means also Justinian was, by his Uncle's Reign, advanced to the Degree of Patrician, and successively made Consul and General of the Army. At length, being solemnly adopted by Justin, he was made Copartner in the Empire, on the First of April 527, which happen'd to be Easter-Day, and four Months after, became sole Master of the Empire, by the Death of his Uncle and Adoptive Father.

The constant Success, which attended this Prince in all his Undertakings, his Piety and Courage, were alone sufficient to attract the Love and Admiration of his Subjects, and even of Foreign Nations; but Providence was pleas'd to second all these in giving him great Generals, and most Skilful Lawyers, by whose assistance he perform'd so many Wonders both in Peace and War.

Belisarius conquer'd the Parthians, drove the Goths out of Italy, and the Vandals, with all the Barbarians, out of Africa. Tribonianus, Dorotheus and Theophilus assisted the Emperor in framing his Law, and compiling his Institutes, Code and Digest, which have not a little contributed towards the Glory of his Memory.

—And tho' ~~some~~ maliciously reports, with an Intent to blast this Prince's Reputation, that he was of a dull phlegmatick Constitution, and utterly unacquainted with Polite Learning, it would be highly unjust to give an implicit Credit to what he says, in opposition to all Historical Evidence to the contrary.

'Tis not to be question'd, but this Emperor was endow'd with most of those great Qualities which raise a Man above

above the Vulgar, especially in moderated Courage, with
incomparable Skill. Besides his plain, he was ever success-
ful in his Wars, and very knowing in Affairs of all
kind.

Procopius tells us, (*Lib. 1. de Bell. Goth.*) that *Justinian*
shew'd always great Resolution and Magnanimity in all
his Enterprises. This he reports fairly: And 'tis highly
probable, that many things he says of him in his *Secret*
History, proceeded from the Disguist the Emperor had gi-
ven him.

Paulus Diaconus speaks of him in these Terms: "This
Prince was fortunate in War, and skilful in managing
Civil Affairs. He profess'd the Catholick Faith, was
upright in all his Actions, just in all his Judgments,
and all his Undertakings succeeded to his Wish." *For-
des, Lib. de Rebus Gothicis, in fine*, adds, that by the Valour
of *Belisarius*, he triumphed over many Nations, and that
no time can obliterate the Glory he has acquir'd.

If we may believe what *Justinian* says in his *Epistles* 19,
and 22. Book 10. *Theodulphus*, King of the Goths, addresses
himself to this Emperor in this manner: "All Nations
honour you: 'Tis no new thing to hear an Emperor prai-
sed by his own Subjects; but very particular, to see
Strangers join with them in their Wishes, which we may
well conclude, are hearty and sincere, since they are not
the Effect of Fear."

No Emperor since *Constantinus*, has shewn more Zeal for
the Christian Religion: All his Sentiments were Orthodox.
His Confession of Faith is at the Beginning of his *Code*,
and truly worthy of him. The Magnificent Temple which
he caused to be built at *Constantinople*, is another Mark of
his Piety.

These, and many other evident Testimonials of the Ver-
tues and good Qualities of this Great Man, are of too
much Weight to be over-balance'd by the single Authority
of one *Greek* Historian, who, perhaps, was guilty of the
same Fault, with which *Cicero* in his Oration for *Flaccus*,
reproaches the Authors of that Nation. 'Tis believed,
*Justin II. Son of Dulcissimus and Vigilantia, Justinian's Si-
ster*, accused him of some things for which he had no
grounds. However, 'tis not to be denied, but this Great

Man was too much devoted to the Fair Sex; and we see he always inclin'd to abstinence them, and made several Laws in their Favour.

To conclude, 'tis agreed he was Two and Forty Years old, when he began to Reign, and that he Died the Thirteenth of November, 565. He left *Justin* the Second for his Successor; who, as we said before, being jealous of his Predecessor's Glory, endeavour'd to tarnish his Memory, by spreading many False and Scandalous Reports of him.

Having before observed, that under the Monarchical Government of the Emperors, besides their *Constitutions*, *Edicts*, *Senatus-Consulta*, and *Answers* of the Learned in the Law appear'd; I am now to explain these Two new kinds of Law, according to the Method I propos'd to follow in this History.

But, as the *Senatus-Consulta*, which are to be our Subject, were made in the *Senatus*, and that August Assembly had always the greatest Share in the Administration of Publick Affairs, I thought my self oblig'd to give some Account of it in this Place, in order to render this Work complete. Besides, it must be allow'd, it will very much contribute towards informing us, what a *Senatus-Consultum* was; and understanding of some Passages in our Books, wherein the *Senatus* and *Senators* are mention'd.

C H A P. XIV.

Of the Roman Senate.

THE Institution of the *Senate*, follow'd soon after the Establishment of the City of *Rome*; whose Founder, rightly considering, that nothing is so unstable as *Force*, without *Wisdom*, resolv'd to govern his State, in Concert, with some of the Members which compos'd it.

His Prudence equally appear'd in the Design and Execution. He commanded his Subjects to draw *Three Counsellors*, or *Senators* out of each *Tribe*; and that the *Thirty Curie*, into which the People were divided, should also choose *Three* more; making choice himself of *One* only, whom he plac'd at the Head of all the rest: Thus his Council consisted of an Hundred Persons. But he took particular Care none should be advanced to this Eminent Dignity, but such as were well recommended by their great Age and Merit.

Hence the *Senators* had their Name, *Quasi senes*; and were afterwards called *Patres*, to mark out the Respect which was due to them, or because their Application to Business, and Care of the Republick, made them regarded as *Fathers*. Their Bodies, says *Salust*, were enfeebled by great Age, but their Understandings were fortified with *Wisdom and Experience*.

ROMULUS call'd only a Hundred, as is before observ'd, to this Dignity; but their Number was afterwards considerably augmented: Upon which Increase, the Appellation of *Patres* became peculiar to the old Original *Senators*. The new Ones were called *Conscripti*; and in process of Time, both were join'd, and made use of to signify the whole *Senate*.

At first, none were admitted into the *Senatorial* Order, but *Patriotians*; that is, such as were descended from the Ancient *Senators* created by *Romulus*: Afterwards, the *Roman Knights* were receiv'd into it: Which is the Reason, that *Perseus*, King of *Macedonia*, in *Livy*, calls the *Roman Knights*, *The Chosen of the Youth, and Seminary of the Senate*.

At length, in order to raise an Emulation, which might be advantageous to the Republick, such of the People as had born any Chief Offices, were admitted to be *Senators*; but not till they were first Ennobled.

The ordinary, as well as most important Part of the *Senators* Business, was to consult upon Emergencies, and the Scituation of *Publick Affairs*. So the *Senate*, properly speaking, was at first the Prince's Council; and in time became that of the Republick: Which makes *Cicero* call it, The Guardian, the Defender, and Organ of the Commonwealth; leaving the *Magistrates* the Honour of putting their Resolutions in Execution. In short, as the *Magistrate* had the Command over the People, so the *Senate* commanded the *Magistrate*.

"The *Senate*, says *Polybius*, had the Disposal and Distribution of the *Publick Treasure*; the whole Revenue of the Government was in their Power, and they order'd all Expenses as they thought proper." He adds, "That the *Questors*, which are thought to have been at *Rome*, and had the Office of our modern *Comptrollers* of the Treasury, had no Power to dispose of a Penny of the Money in their Hands without a Warrant from the *Senate*, unless by order of the *Consuls*."

The Appropriation of the *Publick Treasure*, was so absolutely in the *Senate*, that the People never pretended to interfere in it; and it belong'd to them only to regulate all the *Publick Expenses*, and comptroll the Accounts of such as farm'd the *Publick Revenue*.

When it was necessary to dispatch *Ambassadors* to Foreign Princes or Nations, or appoint *Lieutenants* for *Generals* of Armies, or *Governors* of Provinces, the *Senate* made choice of whom they thought fit to fill those Employments.

It was also their Right to receive and give Audience to Foreign Ministers.

The Honours of Triumph could not be had, but by their Permission.

No new Religion or Worship could be introduc'd, till it had their Approbation.

In a Word, the *Senate* was to the Republick, what the *Soul* is to the Body: It directed all its Motions, warded off all Dangers, and kept it in Tranquillity, by prudently preserving an exact Harmony in all its Parts.

There

There were frequent Occasions of assembling the Senate. In the Royal Government, the Kings only had Power to call them together; but under the Free State, that Power devolv'd to the Chief Magistrate of the City: So that the *Praetor* had it only in the Absence of the *Consul*; and that too, upon very pressing Occasions.

There were Two Ways of calling the Senate together; one by Proclamation issued by the *Consuls*, or in their absence, by the *Chief Magistrate*: The other, by a Publick Crier, who proclaim'd in the Streets of the greatest Concourse, the Order of the *Consul* for the Senate's meeting: But this was us'd only upon sudden Emergencies, when speedy Resolutions were necessary.

The *Consuls* had a Right to move their Questions, before any other Magistrate, and to put it to the Vote; and in their Absence, what Right belong'd to the *Priores* or *Censors*: But every Member of the Senate, upon giving his Opinion, had a Right of making other Proposals.

The Meetings of the Senate, were usually on the *Calends*, *Nones*, or *Ides* of every Month: But in *September* and *October*, the Publick Affairs were manag'd by a *Comitia* of the Senate, chosen by Lot.

They were not debarr'd from interring on *Holidays*, but they seldom did; nor upon the same Days as the People assembled, unless the Occasion was very pressing; in which Case, the People adjourn'd their Assembly, to make room for that of the Senate.

Their Places of assembling, were always in some of their Temples, or other Publick Buildings, which had been Consecrated by the *Augurs*.

The Magistrates, whose Right it was to call them together, never met, till they had first offer'd *Propitiatory Sacrifices* to the Gods.

Such Members as made any Motion or Report in a full Senate, were to speak Standing; and when any one Voted, he was to be in the same Posture; after which, he was allow'd to sit down.

As their chief Business was to deliberate upon the Affairs of the State, and other Publick Affairs; so there were great Privileges annex'd to the *Senatorial* Office.

They had a Particular Dress, which distinguish'd them from other Citizens, as is before observ'd.

All Embassies and Honourable Commissions, were generally bestow'd upon the *Senators*, and not on the *Roman Knights*.

The Right of sitting in the Chief Places, at *Publick Shows* and *Ceremonies*, contributed very much towards gaining them Respect.

Whoever offended a *Senator*, was sure to be punish'd with greater Severity, than if he had done the same to a common *Citizen*.

Cicero, in one of his Letters to *Sulpicius*, gives us to know, That if a *Senator* had a Suit commenc'd against him in any of the *Provinces*, he could remove it to *Rome*; which seems to be very like our Privilege in *France*, granted by *Letters of Committimus*.

A *Plebeian*, had the Liberty of excepting only against *Three Judges*; but a *Senator*, by the *Law Cornelia*, of which *Sylla* was the Author, might reject a greater Number.

In the *Provinces*, *Senators* had the Right of being attended by *Lictors*; which belong'd to them from *Custom*; for no *Law* allow'd them that Prerogative.

All these Marks of Honour were common to every *Senator*; but many of them had peculiar Privileges. They were distinguish'd according to the Offices they had born.

For Example; Such as had been *Consuls*, were prefer'd to those that had been only *Pretors*; and he who was at their Head, took Place of all the rest; He was the Man, whose Nomination, as I have before observ'd, *Romulus* reserv'd to himself; and generally the most Ancient of all the *Senate*.

In after Ages, the Honour of *Chief Senator*, belong'd to that Person whom the *Censor* nam'd first, in reading over the List of the *Senators*: But he commonly gave it to an Old *Senator*, who had born some of the chief Offices, as that of *Consul* or *Censor*.

All these Privileges and Honours, were attended with Penalties, Labour, and Dangers.

No *Senator* was permitted to go out of the Confines of *Italy*, without leave, upon some Lawful Occasion.

They were every one oblig'd to give strict Attendance in the *Senate House*, upon Pain of being severely reprimanded.

No one could attain to the Degree of a *Senator*, unless he was possess'd of an Estate to a certain Value, to maintain the Dignity of his Office : And such as by squandering away their Money, were reduc'd to Poverty, were oblig'd to renounce and quit their Places in the *Senate* ; and therefore, to prevent their Extravagance, they were forbidden to run in Debt above Two Thousand *Denarii*, which makes about Two Thousand *French Livres*. In which, the Wisdom of the *Roman Commonwealth* is highly to be admir'd, for obliging the *Senators* to be Rich and Thrifty at the same Time.

But to entitle Men to be receiv'd into this Chief Order of the State, other Qualifications were requisite.

That of being a *Citizen* was absolutely necessary : And if in the Declension of the *Commonwealth*, *Strangers*, and perhaps *Slaves* were admitted to be *Senators*, it was contrary to all Rule ; And therefore, History informs us, that *Augustus* corrected that Abuse, as soon as he came to the Empire.

It was but fit, to use the utmost Precavition in advancing Men to a Place of so Extensive a Power, and Exalted Dignity ; and therefore, a Good Behaviour and Honourable Actions, were the first step that led to it.

Birth was likewise consider'd, in the Choice of a *Senator*. At first, we see, the *Senate* was compos'd of *Patricians* only ; but afterwards, *Plebeians* were admitted ; because the Entrance into the Supream Council, and most Honourable Order of the State, ought to stand open to the Vertue and Merit of every Citizen.

The having well discharg'd any great Office in the Magistracy, was a fair Pretension to be made a *Senator* : A Man's good Conduct and Behaviour in his first Employments, being, as it were, an Earnest of his future Fidelity.

They were also limited to a certain Age, before which, no one could be made a *Senator* : 'Tis not exactly known what that Age was, but generally believed to be *Thirty Years*.

As to the Right of chusing *Senators*, *Romulus's* Successors reserv'd it to themselves ; and the *Roman Emperors* likewise, kept it in their own Hands. In the Beginning of the *Free State*, the *Consuls* and *People* divided that Right between them ;

them; the *Consuls* nominating so many, out of which, the People chose such as they thought best qualified to fill so important an Office.

But after the Creation of *Censors*, who were the Reviewers of all Orders in the State, they took upon themselves to elect *Senators*. As every Fifth Year they review'd the whole Body of the People, they then fill'd up such Vacancies in the *Senate*, as had happen'd by Death, or by Removals of those, whose ill Conduct render'd them unworthy of so eminent a Degree.

CHAP. XV.

Of the *Senatus-Consultum*.

THE *Senatus-Consultum*, according to the Definition of it by *Justinian*, (*l. 5. Tit. Inst. de Jure Natur. Gent. Civ.*) is a Decree of the *Senate*, by which any Thing is ordain'd and establish'd.

This Ordinance of the *Senate*, is sometimes called plainly a Decree, or a *Senatus-Consultum* indifferently; altho' some Authors have observ'd, that we ought to distinguish these Words: For *Senatus-Consultum*, in its proper Signification, is meant of those Ordinances of the *Senate*, which concern'd the Affairs of the Government; whereas a Decree of the *Senate*, is only an Act that regards the Interest of Private Persons, and not the Publick.

Besides, a *Senatus-Consultum* could not be made, but by the *Senate*, whereas a Decree might be pass'd by the Authority of any other Society; and sometimes, by that of a *Magistrate* only; as we see, there are Decrees of *Augurs*, *High-Priests*, &c. Nay the Word Decree, is often us'd in the Law, to signify the Judgment given by a Prince, with Cognizance of the Cause, and which had the Force of Law.

The Design of the Institution of a *Senate*, being for the Management of Publick Business, no doubt they made at all times *Senatus-Consulta* upon Affairs of Moment, in which the Good of the State was concern'd.

Diony.

Dionysius Halicarnassensis mentions One made in the Time of *Romulus*, in order to end the War for restoring the *Sabine Women*, that had been Ravish'd by the *Romans*.

After *Romulus* died, there was a *Senatus-Consultum* made, to put the Government of the State into the Hands of Commissioners, during the *Interregnum*.

By another *Senatus-Consultum*, *Numa Pompilius* was chosen to succeed *Romulus*; the People having on that weighty Occasion, reserv'd the Choice to the *Senate*.

In a Word, there have been abundance of *Senatus-Consulta* made, under all the different Governments of the *Romans*; how and when they obtain'd the Force of *Laws*, I shall hereafter set forth. Let us now see in what manner they were made.

It is easily imagin'd, that the Matters taken into Consideration by the *Senate*, being of the highest Importance, there was a fix'd Number requir'd to pass a Lawful *Senatus-Consultum*; but what that Number was, *Historians* do not exactly inform us.

That which seems most likely in this Case, is, that the Number of *Senators* having been greater or less at different Times, that Proportion of them requisite for passing a Lawful *Senatus-Consultum*, was likewise increas'd or diminish'd, according to the whole Number, at the time of passing it.

The Method was thus; The *President* of the Assembly, collected the Votes of all the *Senators*, and recapitulated their Opinions, in order to Resolve according to the Plurality of Votes.

When they divided, for the more easie counting the Votes, he order'd them to separate into Two Parties, opposite to each other, which he did in these Words, *Qui hoc senserit, huc transite; qui illa omnia, in illam partem*.

After they had voted, any one might retract his Opinion, by passing over and ranging himself with the contrary Party.

The Majority carried the Question, and the Resolution pass'd accordingly, but sometimes Variety of Opinions, occasion'd the Determination to be put off till another Day.

When every particular *Senator's* Opinion was ask'd, it was call'd *Senatus-Consultum per relationem factum*.

But in regulating ordinary Matters, the *Senate* gave their Consent all at once, without going into Debates, or asking every Man's Opinion: And then it was a *Senatus-Consultum*

per

per discessionem factum & cum sententiam pedibus tulisse. Senatores dicebantur.

But a Majority of the Members present, called *discessio in sententiam*, was equally necessary to the passing both these kinds of Decrees. The Difference consisted only in *debating*, or *not*; because the *Senatus-Consultum quod dicebatur fieri per discessionem*, was pass'd in a Moment, as soon as ever it was propos'd, without going into the Merits of the Question, or debating it, as they did when the *Senatus-Consultum per relationem fieri dicebatur*.

As soon as a *Senatus-Consultum* was agreed to by a Majority, one of the Clerks of the Senate, by order of the *Præfens*, read the Resolution aloud; which being done, the *President* dismiss'd the Senate in these Words, *Patres Conscripti, nemo vos tenet, or Nihil vos moror, Patres Conscripti*. But notwithstanding this leave to depart, a *Chief Magistrate* might detain them, if he had any other Business to communicate.

Concerning the Form in which the *Senatus-Consulta* were written, it must be observ'd, they first set down the Time and Place where every one was made; then the Names of all that were present; after that, a short State of the Matter regulated and enacted by the Senate, with the *Magistrate's* Name who mov'd the Question; and lastly, the Resolution of the Senate thereupon, express'd by these Letters, *d. e. r. d. c.* that is, *de ea re ita censuerunt*.

When the Senate recommended the Execution of any Thing contain'd in the *Senatus-Consultum*, to the *Consuls*, they insert'd these Words, *Si res videretur*.

In a Word, most of the *Senatus-Consulta*, especially those made under the *Free State*, ended with these Words, *Si quis huic Senatus-Consulto intercesserit, Senatui placere, ausuriamque perscribi, & de ea re ad Senatum populumque referri*: Which Clause was us'd, because of the Opposition frequently made to the *Senatus-Consulta*, by some of the Principal *Magistrates*, especially the *Tribunes of the People*; who having been created to counter-balance the Authority of the Senate, and preserve the Rights of the People, often oppos'd the Resolutions of the Senate; and sometimes, without any other View, than to lessen their Power, and increase their own, by making themselves more Considerable.

Before these *Magistrates* were allow'd to enter into the *Senate-House*, they sat upon *Benches* over against the Door; and as soon as the *Senatus-Consultum* had pass'd the *Forms* within, it was brought out to them to examine: Such as were approv'd of, they mark'd with the Letter *T.* and when they rejected any, they wrote the Word *Veto* under it; nor were they oblig'd to give any Reason for their Refusal, as I have taken notice before in the Seventh Chapter.

On the contrary, all other *Magistrates* were oblig'd to shew Cause, and give Reasons for their Opposition to a *Senatus-Consultum*: As for Instance, That the *Senate* was not call'd together by *Lawful Authority*, or held in a Place not consecrated by the *Augurs*, or upon a Day prohibited by the *Laws*. And these Objections were to be first remov'd and seal'd, before they could proceed upon the *Senatus-Consultum*.

To preserve the Remembrance of their Resolutions, and transmit a faithful Account of their Conduct to Posterity, they had a *Publick Register*; in which, all their Debates and *Laws* were written, not omitting those that miscarried by the *Tribunes* Opposition.

This was commonly the Business of one of the *Secretaries* to the *Senate*: But when it was necessary to come to a Resolution which was to be Secret, and not divulg'd till put in Execution, the Office of *Register* or *Secretary*, was discharg'd by a *Senator*: And the *Senatus-Consulta* made in this manner, without the Knowledge of the *Officers* or other *Senators*, were call'd *Tacite-Senatus-Consulta*.

All the *Senatus-Consulta* or *Decrees* of the *Senate*, were for a long Time left in the Hands of the *Consuls*; but as they took upon them to suppress some, and alter others, it was thought proper to remove, and place them in the Temple of *Ceres*, under the Care of the *Ediles*: At length they were carried to the Temple of *Saturn*, where the Governments Money was lodg'd, as making part of the *Publick Treasure*.

They went under the Name of the *Magistrate* who presided in the *Senate* at the Time of their making: Thus we have *Senatus-Consultum Trebellianum*, *Pegasianum*, and others of the same kind.

Having

Having thus shewn the Method in making the *Senatus-Consulta*, I shall now speak of their Authority, and when they first acquir'd the Force of Law.

They were ever in use, both under the *Regal* and *Republican* Government; but far from having the Authority of Law.

During the *Free State*, as well as the *Regal Government*, the *Senate* was advis'd with, but it was only for their Opinion; and a *Senatus-Consultum* of it self, was of no Force, till confirm'd by a Law made with the Peoples Consent; which occasion'd that Form so much in use among the Ro-

POPULUS SUBEST SENATUS AUTOR
EST.

But unforeseen Accidents, often plung'd the Government into so great Danger, that immediate Help was necessary; in administering which, the Solemnity of calling a *General Assembly* of the People, and passing the Laws in Form, could not be observ'd: In which Cases, the *Decrees* of the *Senate* had the force of Law, provided the People tacitly consented.

The *Senatus-Consulta* began absolutely to obtain the Force of Law under the Emperor **TIBERIUS**; being made at his Request, and under his Authority: Therefore, it was call'd *Senatus-Consultum factum ad Orationem Principis*, and carried a full and perfect Authority. Upon which, it is to be observ'd, that notwithstanding the People lost the Power of making Laws, under *Tiberius* and the rest of the Emperors, the *Senate* preserv'd their Right of making *Ordonnances* a long Time. 'Tis in this Sente, and with Reference to these *Senatus-Consulta quæ fiebant ad Orationem principis*, we are to understand the Declension of the Ninth Law in the *Digest. de Legibus*, which has these Words, *Non ambigitur Senatum Jus facere posse*. The Author of this Law was *Ulpian*, who lived in the Reign of *Alexander Severus*. Besides the Definition which *Justinian* gives of a *Senatus-Consultum*, (*3 Tit. de Jure Natural. Gent. & Civil.*) shews plainly, the *Senatus-Consultum* had the Force of Law under the Roman Emperors: *Senatus-Consultum*, (says he) *est quod Senatus subest atque constituit; hoc constituebatur*, as he defines a Law and a *Plebiscitum*.

These *Senatus-Consulta*, were a Contrivance of *Tiberius*; who instead of advising with the People, referr'd all Matters to the *Senate*; under pretence, that the Body of the People were grown too numerous to assemble all in one Place. So the *Emperor*, being invested with the Authority of the People, by the *Law Regia*, summon'd the *Senate* together, and propos'd to them such *Laws* as he thought proper to Enact: Which *Laws*, so pass'd, had the same Force as those made in the Time of the *Republick*, nor in reality by the Power of the *Senate*, but in Consequence of the *Prince's* Authority.

Under the later Emperors, the *Senate* had the Power of making *Regulations* at their own Pleasure; but it was only in Cases of small Moment, such *sumptuary Laws*, to suppress Luxury in Apparel; [*L. Unica Coll. de Senatus Consultis*]. But *Leo the Philosopher*, by his Seventy eighth Decree, abrogated the *Law Coll. de Legibus*, and entirely directed the *Senate* of the Power of making any *Edicts* or *Laws* whatever.

Yet, it is pretended, that the *Senate* in those Times, when they were not permitted to make *Laws* themselves, still preserved the Right of examining and approving these proposed by their Princes. (See *Law Coll. de Legibus*.) To which, the Custom of Inregistering our King's *Edicts* and *Decretations* in the *Parliament*, seems properly enough to refer.

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CHAP.

C H A P. XVI.

Of the Lawyers Answers.

THE Lawyers Answers, are the Sentiments and Opinions of those, who were authoriz'd to give Answer upon Law-Questions; for which Purpose, there were Persons appointed under all the different Governments of Rome.

The first Interpreters of the Law, were the Senators and Nobles; whom *Romulus* enjoin'd to give Advice to their Clients; that is, such as were put under their Protection. The Plebeians, therefore, shelter'd themselves under some Powerful Senator, who was oblig'd, to assist them with his good Advice and Credit, in the Management of their Affairs, explain the Law, and do them all manner of good Offices. These Plebeians, on their Parts, gave their Patrons, under whose Protection they had put themselves, their Votes, in Elections of Magistrates; attended him in all Publick Processions; and engag'd in his Service, whenever there was Occasion.

This Relation between Patrons and Clients, was of *Romulus's* Invention; to establish a perfect Union among the Citizens, by a Correspondence between the Rich and Poor.

The Right of interpreting the Laws, was afterwards vested in the College of Pontiffs and Priests, when the Romans found it proper to mix Law with Religion and holy Ceremonies: For this Reason, *Dion. Cassius* observes, *Augustus* assum'd the Title of Pontifex Maximus. Nay, the very Christian Emperors, who abhorr'd the Pagan Ceremonies, and Name of High-Priest, suffer'd themselves to be styl'd so in their Addresses and Medals.

All whose particular Application and Ability had render'd them knowing in the Laws, undertook to resolve such Questions as were brought to them; but their Answers were of no great Weight in the Time of the Republick, nor even under *Augustus*; altho' he allow'd them to give their Opinions publicly. [L. 2. §. 47. ff. de Origine Juris.]

* *Dion. Hist. eccl. Lib. 2.*

In reality, this Emperor, instead of authorizing every Lawyer by a particular Commission, to give his Opinion upon Questions in Law, empower'd all by a General One, but, as 'tis thought, limited their Number. However, this gave their Decisions no great Authority; but they grew into considerable Credit in the Reign of *Tiberius*; who order'd, no one should presume to give an Opinion in Law-Matters, but such as were licens'd by his Special Favour so to do.

Yet for all this, the *Answers* of the Lawyers had not the same Force as Law: For *Tiberius* in his Licences to answer such Questions as should be propos'd to them, laid no Injunction upon the Judges to regard them as Laws in their Determinations: Nor was it practicable, under his Reign, to have given them that Authority, upon account of the Two prevailing Sects of *Sabinians* and *Proculians*, who generally gave contrary Opinions upon the same Question, as shall be shewn hereafter.

'Tis likely the *Lawyers Answers* were first consider'd as Law, under *Valentinian III.* because he confirm'd the Writings of *Gaius Ulpian*, *Paul Papinian*, and others; and forbad the Judges to swerve, in Points of Law, from their Opinions.

And because many Inconveniencies arose from the Difference of Opinions upon the same Question, He order'd, the Judges should be govern'd by the Majority, and in case of an Equality, to follow that Side to which *Papinian* adher'd. [*L. Unica Cod. Theod. de respons. prudent.*]

The Written Opinions of the Lawyers, were grown so Voluminous, that in *Justinian's* Time, they made no less than *Two Thousand Books*; which render'd a perfect Knowledge of them Impracticable: Besides, they were so confus'd, that it was very difficult for the most diligent Reader to reap any great Advantage from them.

These Difficulties *Justinian* remov'd, by setting some to work, to pick out and chuse the Best of this indigested Heap of *Lawyers Writings*; which he reduc'd into a certain Order, and took away *Papinian's* Prerogative; allowing all the Lawyers equal Privilege, without Distinction. [*L. i. §. 5. & 6. Cod. de veteri jure enucleand.*] For, says the Emperor, *Omnia nostra facimus, & ex nobis ei impertitur auctoritas.* (Vide *Jacob. Gothofredum ad Leg. unic. Cod. Theod. de Respons. prudent.*)

But we must take care not to confound these *Answers*, or *Opinions* of the *Lawyers*, with That which in the *Laws* is call'd, *The Authority of the Interpreters*.

For the *Answers* of the *Lawyers* were nothing else, but the *Opinions* of particular Men, as *Papinian*, *Paul Ulpian*, &c. Whereas the *Interpretations* of the *Lawyers*, spoken of in the Ninth Chapter, were the Unanimous Opinion of the whole Society; or what is call'd the *Usage* of the *Bar*, and the *Law* introduc'd by *Practice*. Wherefore, every *Answer* of the *Lawyers*, having a certain *Author*, they are plac'd among the *Cases* of the written *Civil Law*; whereas the *Interpretation* of the *Lawyers*, having no particular *Author*, makes only a Part of the *unwritten*, or what we call the *Law* introduc'd by *Practice*.

But altho' it has been said, that the *Answers* of the *Lawyers* were not always Authentick, it must be allow'd they were ever in great esteem; and those that are reported in the *Pandects*, sufficiently set forth the *Learning*, *Wisdom*, and *Eloquence* of those Great Men, most of whom were rais'd to the highest Dignities of the *Roman Empire*; and many of them taken into the Emperor's Councils, to assist them with their *Knowledge* and *Experience*, in the Management of the most weighty Affairs.

They were justly stiled *Fathers of the Law*, since by their Industry it was brought to Perfection: And for that Reason, I look upon my self oblig'd to take notice of them in this History. Besides, there are a vast Number of *Laws*, which are not to be understood, without knowing the Time when they were made: So that I am perswaded, 'twill be no less Useful than Curious, to be appriz'd in reading a *Law* in the *Digest*, when the *Author* liv'd, and what Rank he held in the *Roman Empire*.

But as this Detail would lead me into too large a Field, it seem'd more advisable to make a separate Chapter of it, in which I shall give a brief Account of all the *Lawyers* that flourish'd in the *Republick*, or under the Emperors before *Justinian*.

And tho' there are no Books remaining that were written by the *Lawyers* who lived under the *Republick*, and but very few *Laws* in the *Digest* taken from their Writings; yet I shall not omit mentioning what is most remarkable of them.

C H A P. XVII.

Of the most celebrated Roman Lawyers.

PUBLIUS PAPYRIUS, was the first *Roman*, that apply'd himself seriously to the Study of the *Law*: He made a Collection of the *Regal Laws*, in the Reign of *Tarquin* the Proud, as is already observ'd.

APPIUS CLAUDIUS was employ'd in digesting the *Law* of the *Twelve Tables*; which was not finish'd till 304, after the Foundation of *Rome*. As he was an expert *Lawyer*, he had the greatest Share in that excellent Work: But his Violence and Injustice, drew upon him the Indignation of the People, which threw him into so deep a Melancholy, that 'tis generally believ'd he Kill'd himself in Despair.

APPIUS CLAUDIUS, Sonnam'd **CENTIMANUS**, said to be Grandson of the former, was likewise a great *Lawyer*, and qualify'd for the highest Employments: He was *Consul* in 449.

SEMPRONIUS, a celebrated *Lawyer*, was descended from the Ancient *Patricians*. The People gave him the Surname of *Wise*; and conferr'd upon him the chief Employments in the Government: He was *Consul* in the Year 450, and afterwards *General* of the *Arm*y.

TIBERIUS CARUNCANIUS was the Author of several memorable *Answers*, but none of his Writings are extant. He was *Consul* in the Year 473: After which, he was *High Priest*, and the first of the *Plebeian* Order that was rais'd to that Dignity. He was also *Censor* and *Dictator*: And so famous for his great Prudence, that his Opinion was follow'd in the most important Cases, both of *Humane* and *Divine Law*.

QUINTUS MUTIUS, was not only an able *Lawyer*, but a great *Politician*, and well vers'd in *Business*. It was he that was sent *Embassador* to *Carthage*, to offer them their Choice of *Peace* or *War*.

52 Of the most celebrated Roman Lawyers.

After him came **SEXTUS ÆLIUS**, who was first *Ædile* and then *Consul*. He made a Book of the *Elements* of the *Law*, intitl'd *Tripartita*, because it consisted of the *Law* of the *Twelve Tables*, the *Interpretations* of the *Lawyers*, and *Cases* of *Law*.

PUBLIUS ÆLIUS lived about the same Time; that is, in 545. He was also *Consul*.

Scipio Nasica, *Publius Attilius*, *Marcus Porcius Cato* and *Marcus Manilius*, flourish'd about the Year of *Rome*, 600.

SCIPIO NASICA acquir'd great Reputation, as well by his Skill in the *Laws*, of which he was a perfect Master, as his upright Conduct in the Offices of *Prætor* and *Consul*; and the Signal Victories he got over the Enemy, obtain'd him a Decree for a Triumph. He was surnam'd **OPTIMUS** by the *Senate*; who allow'd him a House in the *Holy Street* at the Expence of the *Publick*, that they might advise with him more conveniently.

PUBLIUS ATTILIUS, was of the Family of *Attilius Regulus*, who chose rather to undergo the Cruel Torments with which the Enemy threatn'd him, than break his Word. This *Attilius* the *Lawyer*, was the first that had the Title of *Prudent* given him by the People.

MARCUS PORCIUS CATO compos'd several *Law Books*; 'tis of him probably that *Paulus* speaks in the *Law* 4. §. *Cato. ff. de verb. oblig.* He is suppos'd to be the Author of the *Regula Catoniana*, treat'd of in the Seventh Title of the Thirty fourth Book of the *Digest*.

MARCUS MANILIUS, according to *Cicero's* Account, was a very great *Lawyer*, (*Lib. de Clar. Oratorib.*) "If any one should ask me, says he) who deserv'd the
" Name of a *Lawyer*; I would answer, 'twas that Man who
" had a perfect Knowledge of the *Laws* and *Customs* of the
" Place where he professes it; and knew how to put it in
" Practice: And if I must produce Examples, I would
" name *Sextus Ælius*, *Marcus Manilius* and *Publius Mucius*."

Publius Mucius and *Brutus*, flourish'd about the Year of *Rome* 630; and *Publius Rutilius* about 640. This

Of the most celebrated Roman Lawyers. 53

THIS PUBLIUS MUCIUS, of whom *Cicero* speaks in the Passage before cited, compos'd Ten Books upon *Law-Subjects*. He was descended from the famous *Mucius Scaevola*, so renown'd in History.

BRUTUS, equally celebrated for his Actions and Birth, made Seven Books upon the *Law*.

PUBLIUS RUTILIUS RUFUS, who came after him, was first *Tribune of the People*, then *Consul*, in the Year 648; and afterwards *Proconsul* of *Asia*. His Ancestors had been both *Censors* and *Consuls*. All that is related of Him, is, that he was in high Esteem with *Augustus*, who supported all his own Notions, with the Reasonings of this great *Lawyer*.

Towards the Year 650, *Paulus Virginius*, *Quintus Tubero*, *Sextus Pompeius*, *Celius Antipater*, *Lucius Crassus* and *Quintus Mucius Scaevola* appear'd.

PAULUS VIRGINIUS, who was of a very ancient *Patrician* Family, made several *Law-Books*, which are lost.

QUINTUS TUBERO was a *Stoick*, and a good *Lawyer*.

SEXTUS POMPEIUS, was Uncle by the Father's Side to the Great *Pompey*. He is mightily commended by *Cicero* *.

COELIUS ANTIPATER applied himself more to the Art of *Speaking* than the *Knowledge* of the *Law*; therefore, all that *Pomponius* says of him, (*L. 2. §. 40. ff. de Orig. Jur.*) is, that he was an *Historian*. However, He was an able *Lawyer*; and *Cicero* gives him that Character, in the Place before quoted. *Quintilian* † says, He was a Man of great Parts; that his Discourse was solid, pure, correct, entertaining and very lively; and that he was one of the best Writers of his Time.

* In *Bruto*.

† *Llib. 10. Instit. cap. 1. & 2.*

PUBLIUS CRASSUS, Brother to *Publius Mucius*, was *Questor*, *Edile*, and afterwards *Consul*, and *High Priest* at the same time. He was reckon'd an Able and Eloquent Lawyer.

QUINTUS MUCIUS SCAEVOLA, Son of *Publius*, was *Tribune of the People*, *Consul*, and *High-Priest*. He had the Art of expressing a great deal in a few Words, and was always a close Reasoner. He was Master of a pure, and very florid Style; and his Thoughts, tho' Sublime, were no less Substantial. There is reason to believe, that 'tis of him *Cicero* speaks, when he says, "That *Quintus* *Mucius* was the most Eloquent among all the Lawyers, and " the best Lawyer among the Men of Eloquence." He compriz'd the whole Law in Eighteen Books; and was the Author of the *Cautio Muciana*, which provides, That if a Man has a Legacy left him, upon Condition of abstaining from a certain Act as long as he lives, he might require the Delivery of the said Legacy, if he would engage to surrender it in case of not performing the Will of the Testator. But his Merit, great as it was, could not protect him from the Fury of the Wicked: He was Murder'd in the Temple of *Vesta*, in the Year 672, by one *Simbria*, employ'd by the *Prætor Damasippus*; and 'tis reported that the Assassin should say, He was Criminal, because he was too Honest.

About the Year 680, *Aquilius Gallus*, *Balbus Lucilius*, *Sex-tus Papyrius*, and *Gaius Juventius* appear'd upon the Stage.

AQUILIUS GALLUS was a very Popular Man: Whilst he was *Tribune*, he got the Law *Aquilia* enacted; which is spoken of in the Third Title of the Fourth Book of the *Institutes*. He was *Prætor* with *Cicero*, who contracted a close Friendship with him. He was a Knight, and of a Noble Family; for several of his Ancestors had been *Tribunes*, *Consuls*, and *Ambassadors*. He was look'd upon to be so Learned and Honest a Man, that the *Prætors* would often Depute him to give final Judgments in Private Causes; and his Vote was of great Authority in establishing Laws. He was Author of the *Novation per stipulationem Aquilianam*; and settled the Custom of instituting or appointing posthu-

mons

mous Grandchildren to be *Heirs*, upon which we have the famous *Law Gallus*, 28 ff. *de Liber. & Posthum.*

BALBUS LUCILIUS was a considerable *Lawyer*, and admir'd both for his Eloquence and Learning.

SEXTUS PAPYRIUS, the Offspring of an Ancient and Illustrious Family, taught *Servius* the *Elements* of the *Law*; of which he makes grateful Acknowledgment in his Works, and thereby has preserved his Memory.

GAIUS JUVENTIUS, was a great and well-read *Lawyer*.

SERVIUS SULPICIUS, Son of a *Roman Knight*, was the Descendant of one of the most Ancient Families of *Rome*. He was the first *Orator* of his Time except *Cicero*. After *Quintus Mucius* had reproach'd and advis'd him, he applied himself so diligently to his Studies, that he became a most admirable *Lawyer*. He compos'd several Books, wherein he reduc'd the *Science* of *Law* to an *Art*; which before was confus'dly taught by others, without Order or Method. After he had discharg'd the *Prætor's* Office, the *Republick*, being without *Consuls*, and fallen into great Disorder; by Authority of the *Senate*, the Government was put into his Hands. After that, he was made *Consul*, then *Governor* of *Greece*; in all which Employments he acquitted himself so well, that dying upon an Embassy, the People erected a Statue in honour of him, in the Place of Publick Harangues.

Pomponius (*Leg. 2. §. 44. ff. de origine juris*) says, that *Servius Sulpicius* had ALFENUS VARUS GAIUS, AULUS OFILIUS, TITUS CÆSIUS, AUFIDIUS TUCCA, AUFIDIUS NAMUSA, FLAVIUS PRISCUS, GAIUS ATEIUS, PACUVIUS, LABEO ANTISTHIUS, CINNA, *Labo's* Father, and PUBLIUS GELLIUS for his Scholars: But *Cujacius* says, that the putting *Gaius* into this List, is a Mistake of *Pomponius*, and that he ought to be struck out. All these lived under the Emperors *Julius* and *Augustus Cæsar*: Eight of them left some of their Works behind them; out of which *Aufidius Namusa* made a Body of *Law*, divided

56 Of the most celebrated Roman Lawyers.

ded into Fifty Books. The most celebrated amongst them were *Alfenus Varus*, who was *Consul*, and wrote *Forty Volumes* upon the *Law*; and *Aulus Ofilius* a Roman Knight, and *Julius Caesar's* bosom-Friend.

Besides several Books which he wrote upon the nicest Points of *Law*, he reduc'd all the *Prætor's* Edicts, of which *Servius* had publish'd too short an Extract, into one Volume.

There were many other *Lawyers*, who lived and were eminent about the same Time, as *Trebattus*, *Aulus Cascellius*, *Quintus Ælius Tubero*, *Ateius Capito*, and *Antistius Labeo*.

TREBATIUS was Disciple to *Cornelius Maximus*; he labour'd hard at the *Law*, and 'twas at his Instigation that *Augustus*, who esteem'd him very much, introduc'd the Use of *Codicils*. He had been Banish'd for siding with *Pompey*; but *Cicero*, who lov'd him, got him leave from *Caesar* to return home, whom he afterwards served in Quality of a Counsellor; and was offer'd by him to be made a *Military Tribune*, and to have a Dispensation from attending the *Army*; which could not be an agreeable Life, to a Man that by choice had preferr'd the *Gown* to the *Sword*.

AULUS CASCELLIUS, who was a Knight, distinguish'd himself by his Knowledge, both in the *Law*, and all kinds of polite Learning. *Trebattus* was deeper than *Cascellius*, but in Eloquence he out-did *Trebattus*, and *Ofilius* excell'd them both, as *Pomponius* relates, (*L. 2. §. 45. ff. de orig. juris.*) *Antonius Augustinus* and *Cujacius* remark, that there is a Fault in the Beginning of this Paragraph, which ought not to be read as it is, but thus, *fuit Aulus Cascellius Quinti Mucii Volusii auditor*.

This *Cascellius* was contented with the *Quæstorship*, and refus'd to accept of any higher Office, altho' *Augustus* made him an Offer of the *Consulship*. There is only One of his Books remaining, entitl'd *Benedictorum*.

Altho' in the *Law*, *Pomponius* speaks of *Volusius* only by the Bye, as having been *Cascellius's* Master, yet it appears, he wrote upon the *Law*; and *Cujacius*, in his *Notes* upon *L. 21. §. 2. ff. de annuis Legatis*, speaks very advantageously of a Treatise written by him upon the *AS*; and advises all Beginners to read it, before they enter upon the *Institutes*.

Q. ÆLIUS TUBERO, who follow'd *Offilius*, was of an Ancient Family. After having run thro' the Study of *Rhetorick*, and pass'd to that of the *Law*, he wrote several Books of *Law*; but the antiquated Style they are in, makes them very disagreeable to the Reader.

ATTEIUS CAPITO, *Offilius's* Scholar, understood the *Publick* and *Private Law* perfectly well. He was *Consul* in the Year of *Rome*, 746. He wrote *Commentaries* upon the *Law* of the *Twelve Tables*; Seven Books of the *Sacerdotal Rights*, One of the *Senatorial Offices*, and a *Commentary* upon *Publick Judgments*.

ANTISTIUS LABEO, was of a Noble Family; and Son of that *Labeo*, who was *Sorvius Sulpicius's* Disciple. This *Labeo* the Son, was educated in the *Law* by *Trebatius*; He had also many *Law-Lessons* from others. That he might apply himself wholly and solely to the Study of the *Law*, he refus'd to be made *Consul*, being offer'd it by *Augustus*. He spent Six Months of the Year, in conversing with Learned Men, and the other Six in writing of Books. He made a *Commentary* upon the *Law* of the *Twelve Tables*; Thirty Books *ad Edictum Prætoris peregrini*; some upon the *Edict Prætoris Urbani*, and Eight Books *Pichanon*, that is, *credibilium* or *verisimilium* *.

As to these Two last *Lawyers*, 'tis to be observ'd, they were Authors of Two different Sects: For *Atteius Capito*, sticking closely to the common Method, went on still as he was taught, without altering a Tittle; whereas *Labeo*, relying much on his own Judgment and Knowledge, innovated and chang'd many Things, which Division was much widened by Two *Lawyers* that succeeded them, as will be seen hereafter.

Under *Tiberius*, *Claudius*, *Nero*, and *Vespasian*, there appear'd *Cocceius Nerva*, *Masurius Sabinus*, *C. Cassius Longinus*, *Proculus*, and *Nerva* the Son.

* See *Ant. Gall. Book 13, Cap. 10.*

58 Of the most celebrated Roman Lawyers.

COCCEIUS NERVA, who was a very Eminent Lawyer, embrac'd *Labeo's* Party, and was in great Favour with *Tiberius*.

MASURIUS SABINUS, was a Roman Knight, and at length made a *Senator*. Among the rest of his Works, he compos'd Twelve Books call'd *Memorabilia*, Three *Commentaries de Indigenis*, and One Book *de Furtis*. Many Places of the *Digest* are taken from his Works. He was in great Credit with *Tiberius*. He lifted himself in *Ateius Capito's* Party, which from thence was call'd the *Sabinian* Sect.

CAIUS CASSIUS LONGINUS succeeded *Sabinus*. He was *Consul* with *Quirinus* under *Tiberius*, in the Year of *Rome*, 764; and *Governor* of *Syria*, under *Claudius*, in 782, according to *Tacitus*, *Annal.* 12. The high esteem he was in, as an excellent Lawyer, was the Reason that the Party he espous'd was call'd the *Cassian* Sect, as the other had the Name of the *Sabinian*.

PROCULUS succeeded *Nerva*. His profound Learning and Skill in the *Laws*, got him great Reputation under *Vespasian*. He adher'd to *Labeo's* Party, which afterwards went by the Name of the *Proculeian* Sect.

NERVA the Son, was in play at the same Time; He follow'd his Father in embracing *Labeo's* Party. He has left several Books *de usu capionibus*. If we may believe *Ulpian*, he was so great and early a Proficient in the *Law*, that he answer'd Questions publicly at the Age of Seventeen.

There was at the same Time another **CASSIUS LONGINUS**, of the Order of Knighthood, who was *Prætor*: We find many *Laws* in the *Digest* taken from his Writings.

CÆLEUS SABINUS, who was *Consul*, was a great Favourite of *Vespasian's*. He succeeded *Cassius Longinus*, and was of the same Sect. He wrote a Book upon the *Edict* of the *Ædiles Curules*.

PEGASUS, who lived also in *Vespasian's* Time, was *Consul*, and *Governor of Rome*. *Juvenal* calls him the Best and most Sacred *Interpreter* of the *Laws*. He was Author of the *Senatus-Consultum* which goes by his Name, and is spoken of in the *Institutes*, under the Title *de Fidei Commissar. hereditatib.* He succeeded *Proculus*; and the *Proculian* Sect, which he follow'd, was afterwards call'd by his Name, the *Pegasian*.

Under *Trajan*, *Adrian*, and *Antoninus Pius*, there appear'd *Favolenus Priscus*, *Celsus*, the Father and Son, *Neratus Priscus*, *Alburnus Valens*, *Tuscanus*, *Salvius Julianus*.

JAVOLENUS PRISCUS, succeeded *Celsus Sabini*; He was *Salvius Julianus's* Master, as appears by the *Law 5. ff. de manumiss. vindict.*

CELSUS the Father, was very much esteem'd by the Emperor *Trajan*, and a Member of *Adrian's* Council: He succeeded *Pegasus*, whose Sect he follow'd.

CELSUS the Son succeeded his Father, and adher'd to the same Sect: He was twice *Consul*, and left many Books of *Law* behind him.

NERATIUS PRISCUS follow'd the same Sect; that is, the *Proculian*: He was *Consul*. He made many Books; among which, the most valuable are, the Fifteen concerning the *Rules of Law*.

ALBURNUS VALENS, **TUSCIANUS**, and **SALVIUS JULIANUS**, succeeded *Favolenus*, and embrac'd the opposite, that is, the *Sabinian* Sect

Valens wrote Seven Books upon *Fiduciary Trusts*. We read nothing of *Tuscanus*, in any of our Books; which has induc'd some to think, that in the *Law 2. §. ult. de sine ff. de orig. juris*, instead of *Tuscanus*, it ought to be *Fuscianus*; because there is a *Constitution* of *Antoninus Pius*, directed to *Fuscianus*, in the *Law 7. ff. de Legat. praestand.*

Salvius Julianus, Disciple to *Favolenus*, was Governor of *Rome*, and twice *Consul*. Whilst he commanded in *Aquitain*, the Emperor *Adrian* wrote to him. *Justinian* calls him an excel-

60 *Of the most celebrated Roman Lawyers.*

excellent Lawyer. He was the Composer of the *Perpetual Edict*, whose Decisions were of so much weight; to which he added a *Clause* in favour of the Children of an *Emancipated Son*, to entitle them to a Part of their *Grandfather's Estate*, in Conjunction with their *Father*. The Pleasure he profess'd to take in Studying, and his great Desire to Learn, can never enough be commended: For he us'd to say, *Esti alterum pedem in Sepulchro habere adhuc tamen addiscere vellem.*

Having thus finish'd the Account of all the *Lawyers* mention'd by *Pomponius*; let us now take a View of those he has said nothing of, and whose Writings have contributed to the Composition of the *Digest*. First, let us observe, that the greatest Number of them never made themselves Parties to either of the *Two Sects* before-mention'd; but form'd their *Decisions* according to the Rules of *Justice* and *Equity*.

Of these *Lawyers* not mention'd by *Pomponius*, there were Two who flourish'd in the Reign of the Emperor *Adrian*, *Tertullianus* and *Africanus*.

TERTULLIANUS, who was *Consul* under the Emperor *Adrian*, made Four Books of *Questions*, and One *de Castrensi peculio*. He was Author of the *Senatus-Consultum* which bears his Name, and is spoken of in the Third Title of the Third Book of the *Institutes*. *Cujacius* pretends He wrote upon *Religion*; for which Opinion he quotes *Eusebius*, who says, that *Tertullian* the *Divine* was also a *Lawyer*: But others think they were different Persons of the same Name.

AFFRICANUS lived also in *Adrian's* Time, and was Scholar to *Salvius Julianus*. 'Tis he that *Aulus Gellius* speaks of, under the Name of *Sextus Cecilius*. *Cujacius*, in the Beginning of his *Commentaries* upon the Treatises written by this Author, confirms it, and blames those who have asserted that he lived in *Papinian's* Time, and was his Disciple: However that be, 'tis certain *Africanus* was the most intricate and unintelligible Author of all the *Roman Lawyers*; and no Commentator of less Learning and Penetration than *Cujacius*, could ever have explain'd his meaning.

MARCELLUS, who was one of the Council to *Antoninus Pius*, left several Books of *Law*, which are so many Proofs of his great Learning.

CEREI.

CEREIDIUS or **SERVIDIUS SCAEVOLA**; who liv'd under *Antoninus*, Sirnam'd the *Philosopher*, reduc'd that Emperor's *Edicts* into Writing. He was *Septimius Severus's* Master. 'Tis remark'd of him, that he took more Pains to resolve the Difficulties of any Question put to him, than any of the *Lawyers*.

GAIUS, one of the most celebrated *Lawyers* that *Rome* ever bred, made abundance of Books which help'd to compose the *Digest*. He flourish'd under the Emperors *Antoninus Pius* and *Marcus Aurelius*, as *Oisalius* proves in his Preface to that *Lawyer's Institutes*. So that supposing there had been a *Lawyer* of that Name in the Time of the *Republick*, as *Pomponius* mentions, it must have been another Man. There is no notice taken in History what *Offices* he pass'd through, nor of any other Circumstance of his Life; but his Learned Writings sufficiently proclaim his Praise.

PAPINIAN, who study'd under *Scævola*, was Master of *Requests*, *Treasurer*, and Captain of the Guard to *Septimius Severus*, by whom he was highly esteem'd. He was called the *Aflum of Right and Treasure of the Laws*: He was the most Ingenious and Learned of all the Fraternity: Therefore *Cujacius*, who was better able than any Man to discover his Excellencies, says in his *Epistle Dedicatory* to the *Theodosian Code*, "That there never was so great a *Lawyer* before, nor ever will be after him."

Antiquity also speaks of his sublime Genius, in the highest Terms of Commendation: And the Honour conferr'd upon him by *Valentinian III.* who order'd, that in case of an Equality of Opinions, *Papinian's* should turn the Scale; sufficiently teaches us, how great a Veneration we ought to have for his Memory.

The *Exactness* and *Perfection* which are in his Writings, and the great *Abundance* of them, would induce one to think, he exceeded the ordinary Term of Human Life: Yea, 'tis agreed by all Historians, that He was not *Eight and Thirtty* when he was taken off by a Violent Death; which cannot be imputed to any other Cause than his *Virtue*, and the *Cruelty* of him who commanded it.

After

62 Of the most celebrated Roman Lawyers.

After *Caligula* had murder'd his Brother, he would feign have perswaded *Papinian* to justify the Fact to the *Senate* and *People*; but he answer'd, 'twas much easier to commit *Parricide*, than to justify it: Which drew upon him the Emperor's Resentment, who order'd him to be Beheaded.

ULPIAN was at first Tutor to *Alexander Severus*, afterwards his Secretary, and much favour'd by him. Having been of the Council of State, his Merit quickly rais'd him to the Office of Captain of the Guard, which was the most considerable of all the Empire. We have many of his *Laws* in the *Digest*, and several *Fragments*, which are great Helps towards understanding the Law. All his *Remains* sufficiently shew, how greatly he had distinguish'd himself in the Science of the *Laws*. Many of the Emperors give him the highest Commendations, as well as *Justinian*, who in several Places speaks of his sublime Genius. But his over-great Attachment to the Pagan Superstitions, and his severe Persecution of the *Christians*, very much eclipse the Glory of his Memory. He was Kill'd by the *Prætorian Guards*, in the Year of Christ 226.

JULIUS PAULUS, *Papinian's* Scholar, was *Prætor*, *Consul*, and Captain of the Guards, to all which he attain'd by his singular Merit: He lived in the Reign of *Alexander Severus*. His *Statue* is to be seen at *Padua*, where he was born. No Lawyer has wrote so much as he; his *Style* is clear, and his Determinations Judicious. Some will have it, that he was not only an excellent Lawyer, but a very good Poet: *Aulus Gellius* says thus of him, *Poeta vir bonus, rerum literarumque veterum impensè doctus*. Lib. 19. Cap. 7.

POMPONIUS, who was brought up under *Papinian*, was one of the Council to *Alexander Severus*. He apply'd himself closely to the Study of the Law, in which he had good Success. We have many of his *Laws* in the *Digest*, among the rest, that *de Origine Juris*, ff. 2.

HERENNIUS MODESTINUS, was *Ulpian's* Scholar, or, as some say, *Papinian's*: He was a perfect Master of the Beauties of the *Greek* and *Latin* Tongues. Under *Alexander Severus*, who made him one of his Counsellors

fellors, he was rais'd to be *Consul* with *Probus*, in the Year 228; and was afterwards nominated for *Tutor* to the young Prince, *Maximianus*. He made several Books of *Law*; among the rest Two *Greek* ones, of the *Excuses* of *Tutors*.

There is nothing remarkable in History of several other *Lawyers*, whose *Laws* are to be seen in the *Digest*; therefore I shall only set down their Names, after having first acquainted the Reader, that most of them liv'd under the *Antoninus's*, and their Successors.

Such as *TARUNTIUS PATERNUS*, *ÆMILIUS MACER*, *TERENTIUS CLEMENS*, *ARIUS MEXANDER*, *AURELIUS ARCADIUS*, *LICINIUS RUFINUS*, *PAPYRIUS JUSTUS*, *PUBLIUS FURIUS ANTHIANUS*, *MAXIMUS HERMOGENIANUS*, *FLORENTINUS*, *CLAUDIUS TRYPHONINUS*, *CALISTRATUS*, *VENULEIUS SATURNINUS*, *JULIUS MAURICIANUS*, *JULIUS AQUILIUS*, and *ÆLIUS GALLUS*.

Having thus given an Account of all the *Lawyers*, whose Writings have contributed to the Composition of the *Digest*, I think I ought to say something of *TRIBONIAN*, who was particularly commission'd, to reduce them into Order.

He was accounted one of the Brightest and most Skillful *Lawyers* of his Time; and to have had an universal Knowledge of all *Sciences*. His great Parts quickly rais'd him to the highest Preferments, and won him the Esteem and Confidence of *Justinian*. It was by his Advice, the Emperor undertook the Abridgment of the *Civil Law*, which till then lay dispers'd in an infinite Number of Books. And the Emperor's Success in that great Undertaking, was intirely owing to his Care and Labour.

Tribonian was not only a Man of a sweet and complaisant Temper, but of strict Morals; and his Life had been a compleat Pattern of Virtue, had it not been for his too great love of Riches; which has made many of his *Laws* suspected of Self-Interest; and 'tis pretended, that Money has often made changes in the *Laws* of which he was the Author. *Eruditus erat admodum & indefessus sed habendi cupidior*. *Suidas* would have him pass for an *Atheist* and nauseous *Sycophant*, whose only View was to govern the Empire, under

64 *Of the Law-Books before Justinian's Time.*

der *Justinian's* Name and Authority. But *Procopius*, a Grave and Cotemporary Author, speaks of him in a quite different Strain, which seems to come nearer the Truth.

Tribonian was Master of the Household ; the Emperor *Justinian*, in his Preface to the *Institutes*, speaks of him in these Terms ; *Triboniano viro magnifico magistro & exquestore sacri palatii, nostri & Ex Consule.* (See my Explanation of the Word *Exquestor* in this Passage.)

Hitherto I have treated of the most remarkable Things in the several *Roman Laws*. I am now to give an Account of the chief Compilations of them, before *Justinian's* Time ; after which, I shall speak of those made by his Order.

C H A P. XVIII.

Of the Law-Books before Justinian's Time.

AS soon as there were any *Laws* establish'd at *Rome*, care was taken to collect and reduce them to Order ; the Chief of which I shall give an Account of in this Place : Because it will very much help towards understanding several Passages, wherein they are mention'd in our Books.

Under the *Regal* Government, they had Two Principal Compilations.

The First consisted of the *Laws* made by *Numa Pompilius*, relating chiefly to *Religion* and *Divine Worship* : These *Ancus Martius* took out of the *Pontiff's Registers*, put them into Order, and then hung them up in the Publick Places.

The Second was that of the *Regal Laws*, made by *Papirius*, in the Time of *Tarquin* the Proud : This was called after the Author's Name, the *Papyrian Civil Law*, as I have observ'd before. During the *Republican* Government, all that remain'd in use of the *Regal Laws*, was collected with great Exactness ; to which the most Wholesome *Laws* of the chief Cities of *Greece* were added : And out of them, the whole Body of the *Roman Law*, contained in the *Twelve Tables* before spoken of, was taken.

After

Of the Law-Books before Justinian's Time. 65

After the *Law* of the *Twelve Tables*, the *Lawyers* compos'd certain *Forms* for regulating the *Acts* and *Proceedings* of the *Court*: Of these *Appius Claudius* made an exact *Collection*, which his *Secretary* stole from him, and publish'd as aforesaid.

Let us now see what *Compilations* of *Law*, were made from the *Time* of *Julius Caesar* to *Justinian's*.

First then, In *Julius Caesar's* *Time*, *Osilius* the *Lawyer* undertook a *Compilation* of the *Prætors Edicts*, which a long time after were made into a *Perpetual* one, by *Julianus*, at the command of the *Emperor Adrian*.

Whilst *Constantine* the *Great* Reign'd, *Gregorius* and *Hermogenius*, both excellent *Lawyers*, undertook each of them to collect the *Constitutions* of the *Pagan* *Emperors*, from *Adrian* to *Dioclesian*; which Two *Books* were call'd by their Names, the *Gregorian* and *Hermogenian Code*.

About One Hundred and twenty Years after this, *Theodosius* the *Younger* order'd a *Collection* to be made of the *Constitutions* of the *Christian* *Emperors*, from *Constantine's* to his own *Time*. He made also another *Code*, divided into Seventeen *Books*; which was publish'd in the Year of *Christ* 438, and called the *Theodosian Code*.

Thus the *Constitutions* of the *Roman* *Emperors*, from *Adrian* to *Theodosius* the *Younger*, were comprehended in these Three *Collections*.

All that remains of the Two first of these *Books*, are some *Fragments*, which *Cujacius* has plac'd at the End of the *Theodosian Code*.

This last *Code*, publish'd under the Name and by the Authority of *Theodosius* the *Younger*, was receiv'd and follow'd, till it was suppress'd by *Justinian's* *Order*.

It is a *Work* not altogether unworthy the *Observation* of the *Learned*, as containing the *Decisions* made upon various *Points* of *Law*, by several *Emperors* from *Constantine* the *Great* to *Theodosius* the *Younger*: Besides these *Decisions*, which are for the most part *Edicts* or *Rescripts*, given by those *Princes* to *Magistrates* who desir'd their *Advice*; there are many *Harangues* spoken in the *Senate*, *Ordinances* concerning their *Proceedings*, *Deliberations* of the *Emperors* *Councils*, and *Orders* hereupon, sent to the *Deputies* in those *Provinces* which depended on the *Empire*.

86 Of the Law-Books before Justinian's Time.

So that it was no sooner finish'd, than publish'd and receiv'd, both in the East and Western Empire. The first *Novel*, which is at the Head of this *Code*, shews that the Emperor employ'd all his Authority, and how desirous he was to bring a Work undertaken by his Orders, to a happy Conclusion.

Valentinian the Third, who govern'd in the West, soon adopted this *Code*, which his Father-in-Law *Theodosius* had order'd to be made, for the Advancement of the Law. Besides this Consideration of Alliance, and other Reasons he had to respect *Theodosius*, by whose Choice he was made *Cesar*, and Heir to the Empire; there was another Motive which induc'd *Valentinian* to make this *Code* the Law of his Dominions, which he himself sets forth in one of his *Novels*; viz. That as the Empire obey'd Two Princes, whose Wills were inseparable, so there ought likewise to be an exact Uniformity in their Laws.

If there be any that will dispute the Authority of the *Theodosian Code* in the West, it would be an easie Matter to refute them by the Evidence of several Authors, either Contemporaries or that have written since; their Names and Quotations are to be found in the Learned *Gothofredus Prolegomena*, at the Beginning of his *Commentaries* upon this Collection of the *Imperial Constitutions*.

Sometime after the *Theodosian Code* appear'd, about the Year 506; *Alarick* the Second, King of the *Goths*, made use of these Three Codes, and especially the *Theodosian*, to form a New Body of *Roman Law*, which he publish'd Twenty three Years before *Justinian's Code* came out, by the Advice of his Bishops and Nobles.

This was compos'd by *Amien*, *Refrendary* to *Alarick*, an Officer answerable to our Modern *Chancellor*; and publish'd under the Name of the *Theodosian Code*; of which, properly speaking, it was an Abridgment: This *Code* was for a long time, all the *Roman Law* that was known or used in *France*.

It were to be wish'd that *Amien* had contented himself with making choice only of what was most useful in that *Code*, without altering the Texts which he has taken to make his Collection; but he has done quite otherwise, and very likely with a View of pleasing *Alarick*: Some he has alter'd, others he has abridg'd, and to others added his own
Inter-

Of the Law-Books before Justinian's Time. 67

Interpretations; but one cannot avoid distinguishing his Language, which is not like the *Latin* of the Text of the *Roman Law*, but the Language of a Chancellor of a *Visigoth-King*: However, in Consideration of what is taken out of the *Ancient Law*, his Work is not totally to be rejected.

It is not to be deny'd, that *Amien's* Compilation was very favourably receiv'd by the *Goths*; it was not only call'd the *Theodosian Code*, but generally the *Roman Law*: And it is quoted by that Name in the *Capitulars* of our Kings, in *Marculfus*, in the *Laws* of the *Burgundians* and *Ripuarians*.

The Book call'd *Jurisprudentia Vetus anti Justiniane cum Notis Schulringii*, has this whole Collection in it, and several Fragments of the *Ancient Lawyers*; it was printed at *Lejden*, in a Large *Quarto*, in the Year 1717.

Having given this brief Account, of the several Collections of *Laws* extant before *Justinian's* Time; I shall now proceed to speak of those made by that Emperor's Order; and which form the Body of the *Civil Law* in its present State: But first, let us consider the Motives which induc'd him to reform the *Law-Books*, and set them in a new Light.

The *Three Codes* just now mention'd, were rang'd in no kind of Order, and contain'd abundance of *Constitutions* contradictory one to the other; which occasion'd a terrible Confusion in the Minds of those who consulted them: Besides, the Multiplicity and vast Variety of the Writings of the *Ancient Lawyers*, render'd the Study of them equally tedious and difficult.

In truth, there was no Authentick Collection before *Justinian's*, of the *Answers*, and other Writings of the *Lawyers*, which lay scatter'd in above *Two Thousand Volumes*; and the Contradictions in them, were alone sufficient to render the Reading of them utterly useless.

To remedy these Inconveniencies, and facilitate the Knowledge of the *Laws*, *Justinian* undertook to make a general Compilation of the best and most useful *Constitutions* of the Emperors his Predecessors, and all his own to that Time: He form'd also a Project of collecting the best of the Writings of the *Lawyers*, and by that means, making a Complete Body of *Civil Law*; to which alone, recourse might be had, without the trouble of consulting all those other Volumes, which had introduc'd so much Confusion.

The Vastness of this Project, tho' the Emperor had no other Merit than the putting it in Execution in the manner he did, ought to transmit his Memory to the most remote Ages ; and the rather, because before he undertook it, it was look'd upon as an impracticable and fruitless Attempt.

CH A P. XIX.

Of JUSTINIAN'S Code.

THE Body of the Law, as it has been convey'd to us, is compos'd of the *Code, Digest, Institutes* and *Novels*.

The *Code*, which is to be the Subject of this Chapter, was the First of these Four Collections undertaken by *Justinian* ; who in 528, being the Second Year of his Reign, signified his Pleasure to *Tribonian*, and other celebrated *Lawyers* of the Time, to make choice of the best and most useful *Constitutions*, pass'd by the Emperors from *Adrian* to his Reign, and put them in better Order than they were in the Three *Codes* hitherto publish'd ; which Order is set forth in this Emperor's *Constitution, De Novo Codice faciendō*, at the Beginning of his *Code*, and directed to the *Senate of Constantinople*.

Tribonian soon comply'd with the Emperor's Desire ; the Compilation which he was order'd to make, came out the next Year, under the Name of *Justinian's Code* ; as appears by the Emperor's *Ordinance* to confirm this *Code*, intitled, *De Justiniano Codice Confirmando*, and directed to the Governor of the City of *Constantinople* : By this *Ordinance*, which is also at the Beginning of this Compilation, *Justinian* gives every Thing therein the Authority of *Law* ; declaring, that he repeals all other *Constitutions* not compriz'd therein ; and forbidding all Persons whatsoever the Use of them : And then, to recommend them the more, tells how he has remov'd the Contrarieties in the *Gregorian, Hermogenian* and *Theodosian Codes*.

But

But tho' *Justinian's Code* is justly accounted an excellent Work, I cannot deny but the Order observ'd in the Succession of the Titles, might have been more exact: Besides, *Tribonian*, who (if one may say so) was at the Head of this Work, has been guilty of several Considerable Faults, that have been very hurtful to the Study of the Law; and which would even extinguish the Knowledge of certain Principles, or render them very doubtful, if we could not have recourse to the *Theodosian Code*, for the Explanation of those Laws which *Tribonian* has taken from thence, and transcrib'd into his Collection of *Imperial Constitutions*.

In effect, it is certain, as *Gothofredus* has very rightly observ'd in his *Prolegomena*, at the Beginning of his *Commentaries* to the *Theodosian Code*, That *Tribonian* has mutilated some of the Laws, and even omitted Things in others, which were essential towards understanding them; and pass'd over in silence the Facts which gave occasion to their being made: He has also sometimes divided a Law into Two, and reduced Two into One; and in short, made no scruple to attribute many Laws to Emperors who were not the Authors of them, or had given quite contrary *Decisions*; which cause frequent Obscurities, it might be wish'd, were not be met with in a Collection, that in all other Respects, deserves to be highly prais'd. But by good Fortune, we have the *Theodosian Code*, to compare with the Learned *Gothofredus's Commentaries*, which may be of great use towards the understanding abundance of Laws in *Justinian's Code*.

As to the *Imperial Constitutions* that make up this Collection, it must be acknowledg'd, the Style of many of the Laws is not so concise, nor their *Decisions* grounded on so good Reasons as one could wish; yet, we cannot sufficiently admire in most of them the Wisdom and Goodness of God, who made so many Wicked Princes his Instruments to establish such just and Equitable Laws: *Nero*, *Demitian*, *Commodus*, *Helioabalus*, and *Caracalla*, were no better than Wild Beasts in Human Shape, full of Impiety and Cruelty; as well as *Trajan*, *Valens*, *Decius*, *Galienus*, *Dioclesian*, and *Julian*; yet their *Ordinances* are so just, that they are with great Reason admir'd by all Nations at this Day.

The great Care these took to find out Expedients for appeasing and pacifying *Civil Commotions*, often hinder'd the most declar'd Enemies of the Christian Religion, to refuse the Christians their Assistance in supporting the *Authority* and *Councils* of the *Bishops*; as *Herodius* proves, *Lib. 3. rer. judicar. tit. de Hæreticis*, Cap. 2. wherein the wonderful Effects of Divine Providence are visible, which often makes use of the very Persons to strengthen the Christian Religion, whose only View was to subvert it.

As long as the Seat of the Empire was at *Rome*, and disinterested *Lawyers* were employ'd by the Emperors in drawing up their *Constitutions*, they were Short, Sententious, and Elegant; but after *Constantine* had transported the Seat of the Empire to *Constantinople*, where the *Latin Tongue* was in less Perfection, the Emperors employ'd none but their *Chief Officers* to frame their *Constitutions*; and as they were not always very expert *Lawyers*, and often bias'd by Favour or Interest, the *Imperial Constitutions* carried but little in abundance of Words; and are remarkable for a *Bombast Style*, fitter for an *Orator* than a *Prince*: In a Word, they come very short of the rest in *Eloquence*, *Prudence*, *Exactness* and *Majesty*; this is plainly to be seen, by the *Constitutions* of *Marcianus*, *Leo*, *Zeno*, *Anastasius*, *Justin*, and of *Justinian* himself.

Code, in *Latin Codex*, is what we commonly call a *Book in Sheets*; which comes from a Custom among the *Antients*, of writing upon the *Bark of Trees*, before the Invention of Paper; which Name was given by way of Excellence to the Collection of the *Imperial Constitutions*.

Justinian's Code is divided into *Twelve Books*, every *Book* into separate *Titles*, and each *Title* into *Laws*, each *Law* containing several *Parts*; the First is called *Principium*, being the Beginning of the *Law*, and those which follow, *Paragraphs*; so that the Part next the Beginning, is the First *Paragraph*: Upon which we must observe, that *Paragraph* is a *Greek Term*, signifying a *Part* or *Section* of a *Law*, that contains one *Article*, the Sense whereof is compleat.

The First Book of the *Code* treats of the *Catholic Faith*, *Churches*, *Bishops*, *Ecclesiastical Persons*, *Hereticks*, *Jews*, *Pagans*, *Church-Priviledges*; then of *Laws*, and their different *Kinds*; and lastly, of *Magistrates*.

The Second Book explains the *Forms* to be observ'd in commencing a *Suit*, then it treats of *Restitutions*, and after that of *Compromises*, *Sureties* that are to be given, and the *Oath of Calumny*.

The Third Book speaks of those who may *stand in Judgment*, of *Contestation* in the Cause, of *Holydays*, of the *Jurisdiction* wherein we are to pursue our *Rights*; after which, it treats of *undutiful Testaments*, *undutiful Donations* and *Dowries*, of the *Demand of Inheritance*, of the real *Action of Services*, of the *Law Aquila*, of *mix'd Actions*, of *Actions for Crimes* done by *Slaves*, of the *Action ad exhibendum*, of *Gaming*, of *Burying Places* and *Funeral Expences*.

The Fourth Books begins with the *Explanation of Personal Actions* which are deriv'd from the *Loan* and *other Causes*; after which it speaks of *Obligations*, and *Actions*, with their *Effect*, in Relation to *Heirs*, and *other Persons* bound by them; then it treats of *Testimonial* or *Written Evidence*, of *Things borrow'd* for use, of the *Contract* by *Pledge*, and the *Personal Action* thereon, deriv'd from the *Senatus-Consulta Macedonianum* and *Velleianum*; of *Compensation*, *Usury*, *Deposites*, *Mandate*, *Partnership*, *Buying* and *Selling*, *Permutation*, *Hiring*, and *Mortgages*.

The Fifth Book treats of *Espousals*, *Donations in Contemplation of Marriage*; then of *Marriages*, *Womens Portions*, of the *Action* that lies for the *Recovery* of the *Dowry*; of the *Donation* made between *Persons join'd in Wedlock*; of *Estates* given in *Dowry*; of *Alimony*, due from *Fathers* to their *Children*, and from *Children* to their *Fathers*; of *Concubines*; of *natural Children*, and the *Ways* of making them *Legitimate*. After which, it treats of *Testamentary*, *Legal* or *Dative Tutorships*; of those who have a *Power* to appoint, or be appointed *Tutors*; of the *Administration* of *Tutors*, and the *Action* arising thereon, as well against *them*, as their *Heirs* and *Bondmen*: Then it shews after what manner the *Office* of a *Tutor* ceases; and lastly, it speaks of the *Alienation* of *Minors Estates*.

The Sixth Book, first treats of *Slaves*, and the *Theft* of *Freemen*, and the *Rights* their *Patrons* have over *them* and their *Goods*; then it explains at large the *Prætorian Possession*, called *Bonorum Possessio*; after which, it lays open the whole *Matter* of *Testaments*, as *Institutions* and *Substitutions*, *Preteritions* and *Dis-inheritings*; the *Right* of deliberating the *Re-*

fusal of an Inheritance ; the opening of Wills ; of Codicils, of Legacies, and Fiduciary Bequests ; and lastly, of Successions to Intestates.

The Seventh Book begins with *Manumissions*, after which it treats of Matters relating to *Prescriptions* ; and then of *Sentences and Appeals*, of the *Cession of Estate or Goods*, of the *Seizure of the Debtor's Goods*, and *sale thereof* ; and lastly, of the *Privileges* belonging to the *Exchequer*, those of *Dowries*, and the *Revocation of Goods alienated to defraud Creditors*.

The Eighth Book begins with *Possessory Judgments in Law*, called *Injunctions* ; then of *Pledges and Pawns* ; of *tipulations, Novations and Delegations, of Payments, Acceptations and Evictions* ; after which, it treats of *Paternal Power, Emancipation of Children and their Ingratitude* ; then it explains the *Right Postliminii* ; what is meant by *Custom or unwritten Law* ; *Donations*, their *different Kinds*, and their *Revocation* ; and lastly, of taking away the *Penalty of Celibacy*.

The Ninth Book treats of *Criminal Judgments*, and the *Punishment of Crimes* : The First Title explains what relates to *Accusations*, *Publick or Private Prisons* ; how the *Accusation* drops by the *Death of the Accuser or Accused* ; the following Titles speak of *Criminal Judgments*, which are *Treason* ; *Adulteries*, and other *unlawful Copulations*, *Publick and Private Violence, Ravishing, Homicide* ; and under this last Head, of the *Correction of Slaves*. The rest of the Crimes which come under *Criminal Judgments*, and are explain'd in this Book, are *Parricide, Maleficium*, which comprehends *Poysoning, Sacrilege, Fugling, Sorcery and Witchcraft*. The *Robbing of Sepulchres*, making *false Certificates or false Wills, Extortion, Cheating the Publick, Sacrilege*, and raising *Sedition and Tumults* : Afterwards this Book treats of *Judgments* commenc'd for *Private Offences* ; such as *stealing or taking away any thing out of another Man's Inheritance, before Administration be taken ; Rapine, Cozenage, called Crimen stellionatus, Injury*, and some others ; then it speaks of *Abolition of Accusations*, which proceed either from the *Accused or the Accuser* ; and lastly, of the *Explanation of Punishments*, in which Number is the *Confiscation of Goods*.

Of the Digests or Pandects.

73.

The Tenth Book treats of the *Rights* and *Prerogative* of the *Exchequer*; of *vacant Goods*, and how the same may be united to the *Princes Domain*; of those by whose means the *vacant Goods* are discover'd: After which it speaks of *Treasurers*, *Tributes* levy'd upon the *People*, *Tolls*, *Super-impositions*, *Magistrates* called *Decuriones*, and Matters relating to them; of the *Freedom of Citizens*, of the *Inhabitants of Cities*; of the *Domicil*, or *place of Abode*; of *Publick Offices*, and the *Causes* which exempt Persons from bearing them; of *Embassadors*; of the different *Kinds of Publick Offices*, and *Functions of Officers*; and of those who were intrusted with the *Civil Government* and the *Reformation of Manners*.

In the Two last Books the Emperor speaks of the *Rights* that were common to the *City of Rome* and other *Municipal Towns*; Which were Four: The First is the *Right* of having *Bodies and Communities*; the Second consists in having *Publick Registers*, wherein every *Citizen's Name* and *Condition* were set down: The Third was in having *Dignities* and a *Militia*; the Fourth in having *Officers* for the *Execution of Judgments*, and the *Magistrate's Orders*. The two first of these are explain'd in the Eleventh, and the two last in the following Book.

C H A P. XX.

Of the Digests or Pandects.

IN the preceding Chapter it is said, that *Justinian* in the Year 528, gave Orders for compiling a *Code*, which should contain the most useful and best *Ordinances* of the Emperors, and that the said Work was publish'd the Year following:

As it was his Intention to make a compleat Collection of the *Roman Law*, he made an *Ordinance* in the Year 530, *De conceptione Digestorum*, directed to *Tribonian*; empowering him to chuse a certain Number out of the most eminent *Lawyers*; who, together with Him, were to make a Collection of the best *Decisions* of the Ancient *Lawyers*, and
to

to reduce them into *Fifty Books*, in such a Method as there should be no *Confusion* or *Contrariety* therein: *Sed huiusmodi quinquaginta libris, totum ius antiquum per millesimum & quadringentesimum penè annum confusum, & à nobis purgatum, quasi quodam muro vallatum, nihil extra se habeat.* §. 5. *de conceptione Digestorum.* He orders, that the Volume so composed, should be called *Digestorum vel Pandectarum Volumen*; which were Names given by many of the Ancient Lawyers to their Works.

Then he proceeds to forbid all Lawyers making any *Commentaries* upon that Volume, lest they should introduce the same *Confusion* the *Multiplicity* of the Lawyers Writings, which were very often contradictory to one another, had occasion'd; but he allow'd them to make *Paratitles*, or *Summaries* upon the Titles, to give a general Notion and serve for a Preliminary to the reading of that Work.

Lastly, He orders that every Word should be wrote at full length, and no Notes or Abbreviations made use of, which had caused so much Obscurity and so many Doubts in the Writings of the Ancient Lawyers.

In pursuance of this Ordinance, *Tribonian* made choice of Sixteen able Lawyers, who are nam'd in the last Confirmation of the Digest: They all apply'd themselves to take out of that Infinite Multitude of Volumes, which contained the Writings of the Ancient Lawyers, such Decisions as in their Opinions were the most Judicious and agreeable to Equity.

The Labours of these Great Men were crown'd with Success; for in a very short time they finish'd the Work, notwithstanding it had been often before in vain attempted.

Suetonius, in the Life of *Julius Cæsar*, and *Cicero* in his Book *de Oratore*, report, that *Julius Cæsar* and *Pompey* had a Design to reduce the Roman Law into a Method; which might have been done then with much more ease, considering the vast Number of Writings upon the Law, under the Emperors, down to *Justinian's* Time.

Some there are that affirm, the Emperor *Constantine* had projectèd such a Collection, but it proved abortive; as if Providence had reserv'd the Honour of so great a Work for *Justinian's* Wisdom and Ability.

This excellent Collection of the *Writings* of the Ancient *Lawyers*, made by his Order, was not begun till 530; and was finish'd the Sixteenth of *December* 533: So that it was but Three Years in making; at the End of which, it was publish'd under the Emperor's Name and Authority, as may be seen by those *Ordinances* made for the *Confirmation* of this Work, to which he gave the Name of *Digests* or *Pandects*.

It was called the *Digest*, that is to say, *A Methodical Compilation*; and it had the Name of *Pandects*, as containing *Decisions* upon most of the Questions that can arise in the Law: In short, *τὸν ἐν ἑκείνῳ* in Greek, is *Omne*, and *ἀνατολὴ*, *completor*; so that *Pandecta* signifies a *comprehensive Collection*.

Altho' the great Diligence of *Tribonian* and the rest of the *Lawyers* employ'd in this Work was astonishing, and seem'd to be Praise-worthy, it has nevertheless been found fault with by many; and indeed there was some reason to blame them for slubbering over with so much Precipitation the important Business they had been intrusted with; in which they were so much more inexcusable, as the Emperor had allow'd them Ten Years for the perfecting thereof; Nor was that too long a Term for reading over deliberately the vast Quantity of Books in which the *Writings* of the *Lawyers* were then dispers'd. And therefore, many things in the *Pandects* are Imperfect, Obscure, Uncertain and contradictory: Altho' the Emperor has affirm'd the contrary, 'tis certain there are many *Laws* in the *Digest* which contradict one another; and are no otherwise to be reconcil'd, than by saying, they are the Remains of the ancient Dissention between the *Sabinians* and *Proculeians*.

There are also many *Laws* which have been falsify'd by *Tribonian*, *Quæ manum Triboniani passe sunt*, in order to accommodate them to the *New Law*. Nay, some are of his own making, with a Design to pass them upon the World for Ancient ones; concerning which, *Cujacius* uses these Words, *In fragmentis Pandectarum constat ingentia Tribonianum admisisse flagitia, detortis sæpe, exempli gratia, Ulpiani verbum, in sententiam Justiniani*.

It must not however be imagin'd that all the Faults in the Body of the *Civil Law* are owing to *Tribonian*; for many Places have been alter'd by the Negligence or Ignorance of those employ'd in copying it over.

But be that as it will, it may be truly said, this Work is a Master-piece, exceeding all Commendation. Nor was it properly the Work of *Fifty* or a *Hundred*, but near *Six Hundred Years*; being compos'd of the *Writings* of the most Learned Men that had lived from the Times of the first *Roman* Emperors, to the Year 1282 of *Rome*; which was the Year of Grace 530, when it was first begun.

The *Style* of it is the finest that possibly can be, Elegant and Concise; all the Principles of *Law*, upon all kind of Matters are well establish'd; and the greatest part of the Resolutions are so exact, and at the same time so just, that it is impossible for the Mind of Man to go farther.

If the perusal of the *Digest* occasions so much Surprise and Pains, to those who are not yet in a Condition to understand it; what a Pleasure must it be to such as by their Study and Application, have made themselves able to comprehend and admire the Wise and Learned *Decisions* that are contain'd therein? The Advantage they reap, creates in them a particular Veneration for the Memory of those Great Men who were the Authors of it; and engages them insensibly to make it the chief Object of their Study, being perswaded, and with good Reason, that of all the Works produc'd by the Wit of Man, none can enter into Comparison with this.

Altho' the *Code* has its Merits, and contains abundance of excellent *Laws*, it is very far from being equal to the *Digest*: I have already taken notice that some of the *Laws* in the *Code* were made at *Constantinople*, where the *Latin* Tongue was not in Perfection; but there is a more general Reason to be given for the Inequality between the *Laws* of the *Code* and those of the *Digest*; which is, the different Characters and Employments of the *Authors* of both.

The *Laws* of the *Digest* are nothing else but the Meditations of *Lawyers*, who having no other Business to interrupt their Study, were greater Masters both of its Spirit and Language; and therefore, it is no Wonder if their *Decisions* comprehended much in a few Words, but very clear and decisive; and that the Nobleness and Shortness of their *Style*, was suitable to the Elevation and Exactness of their Thoughts: For being wholly taken up with the Love of *Justice*, they had no other View but the *Publick Good*, and the Desire of giving substantial Marks of their Learning;

so that their *Decisions* were neither ground'd upon nor govern'd by the *Favour* of Great Men, or an immoderate Desire of *Riches*, but by *Right Reason* and *Equity*.

On the contrary, the *Laws* of the *Code* are often obscure, and contain but little in abundance of *Words*; because the greatest part of them were made by *Secretaries* or *Chancellors* to the Emperors; whose Heads being full of *State-Affairs*, minded little else but to please their *Masters*, and advance the Interest of the *Exchequer*: So that being often byass'd by *Favour*, or their own *Interest*, their *Decisions* were not always agreeable to *Justice*.

But if the *Laws* of the *Code* are for this reason much inferior to those of the *Digest*, the Collection of the *Imperial Constitutions* is so very Immethodical, that it is also on this Account much inferior to the Collection of the *Writings* of the Ancient *Lawyers*.

However Praise-worthy the Compilers of the *Digest* may have been, their Work, at least the manner in which they perform'd it, has been blam'd by many Learned Men: But I think, without being Partial, I may say, it is without Reason or Foundation. All they can justly be reproach'd with, is the little Time they took for the Performance.

Many have pretended that this Work, containing only the Fragments of the Ancient *Lawyers*, has been of very little use in the Study of the *Roman Laws*; and that it were to be wish'd, all those *Writings* had come to our Hands in the Original Condition; and the rather, because there are many *Laws* which are not to be understood, for want of having Recourse to the Fountains from whence they are drawn: For this Reason, some have accus'd *Justinian* and *Tribonian* of suppressing the *Twelve Tables* and *Writings* of the Ancient *Lawyers*; others say, that *Tribonian* endeavouring to take in all the *Roman Law* into the Fifty Books of the *Digest*, has confin'd it within too narrow a Compass.

To this it is answer'd, that if the making of the *Digest* has been follow'd with some Inconveniences, the Advantages the *Law* has thereby receiv'd, are far more considerable: Besides, 'tis not certain whether we ought to ascribe the Loss of those Books to *Justinian*. There is reason sufficient to believe, they were lost by the Misfortunes of the Times, the Incursions of the *Barbarians*, and by Accidents which could neither be foreseen nor prevented. More
over,

over, the Choice which had been made of the best of these *Writings*, and which are plac'd in Order in the *Digest*, may very well compensate for their Loss; which, all things consider'd, is not so much to be lamented, in regard of the great Confusion they had introduc'd.

The Truth is, that before the Publication of the *Digest*, the *Roman Law* was like a great Sea, without any Port of Safety; it was dispers'd in so many Volumes, that the Life of the most Laborious Person, would hardly suffice to read them over. Besides, as they were the Works of particular Men, they had no absolute Authority; and as they contain'd many contradictory *Decisions*, all the use they were of, was to occasion Doubts, and keep Men in suspense about Opinions they were willing to embrace.

But the Case is far otherwise with respect to the *Digest*, which comprehends the whole Matter of the *Law*, reduc'd into good Order; and compos'd of the best Part of all those *Writings*: And as they are fortify'd by *Imperial Authority*, all its *Decisions* are so many *Laws*, which have a Right of fixing the Judgment of those who make it their Study. After this, I cannot conceive the Loss of so many Books; which by the Publication of the *Digest* are become utterly useless, is so much to be regretted.

Hottoman blames *Tribonian* and his Fellow-Labourers, for not giving those *Lawyers* a place in the *Digest*, who flourish'd in the Time of the *Republick*; and confining themselves only to those who liv'd under the Emperors.

But this Reptoach, upon the least Reflection, falls of it self: For it was not *Justinian's* Design to revive the superannuated *Law* of the *Roman People*, but to methodize and reform the *Law* in use in his own Time: Besides, whatever Respect *Hottoman* may pretend for those Ancient *Lawyers*, it is certain they were too much addicted to Formalities and Punctilio's upon *Words* and *Syllables*: Besides, the *Lawyers* who succeeded them, took out of their *Writings* whatever they thought best; and made it useful to themselves, by giving it a shorter and more elegant Turn.

In short, some Commentators have affirm'd, that the *Digest* is not in good Order; but others say, it could not be more Methodically dispos'd, than by ranging the several Matters in the Order observ'd by *Justinian*, in his Compilation of the *Perpetual Edict*.

Cujacine

Cujacius speaks of it thus, in his *Paratitles* to the Title *Mandati*; "Every thing therein is rang'd with wonderful Art, not so much by the Skill of *Tribonian*, as that of *Julianus Hermogenianus*, and other Learned Men his Predecessors, whose Steps he follow'd: Those who are desirous of another Method, know not what they say, and are either Malicious, or ignorant of the Science of the Digest.

We have several Editions of the *Pandects*, that disagree in certain Places: The First is the *Vulgar*, which the Ancient Doctors made use of after *Jumerius*. The Second is that of *Holloander*, commonly called the *Noric* Edition; which he made from the Books of *Bologuinus* and *Politianus*. The Third is that after the *Original*, which the *Pisans* had first, and afterwards fell into the Hands of the *Florentines*, where it now is: Many are of Opinion, that this last is the best; and that it was a Copy from the Original, written intirely by *Tribonian's* own Hand. And therefore, to decide all Doubts that may arise upon any Passage, recourse ought to be had to the *Florentine Pandects*.

The *Digest* was divided by the Emperor into Fifty Books; each Book containing several *Titles*, divided into *Laws*, and the *Laws* generally into several *Parts*; the First is called *Principium*, being the Beginning of the *Law*, the rest are called *Paragraphs*.

The First Book begins with laying down the general Principles of *Justice*, and sets forth the different Kinds thereof; after which it treats of the division of *Persons* and that of *Things*; then speaks of *Senators*, and lastly of *Magistrates*; and of their *Delegates* and *Assessors*.

In the Second, we have an Account of the Power of *Magistrates*; and their *Jurisdictions*; how a Person is to be brought into *Judgment*; and how it often happens that the *Persons* agree after an *Action* is commenc'd: The Subject of the latter part of this Book, is *Covenants* and *Transactions*.

The Third Book explains in the first Place, who those Persons are that are allow'd to sue in *Law*; and because such as are *Infamous* are not admitted so to do, the Second Title treats of *Infamous Persons*: The following speaks of those whose Ministry such as go to *Law* are wont to make use of, as *Advocates*, *Proctors*, *Syndicks*, who ought all to abstain from *Calumny*.

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The Fourth explains the different Causes of *Restitution*; and because it often happens that such as have *Disputes*, are willing to avoid the Trouble of a *Law-Suit*. The next Subject it treats of, is *Compromises* and *Arbitrations*; after which, it speaks of *Inn-keepers*, and others into whose Custody we leave any thing.

The Fifth, after having spoken of *Judgments*, explains who ought to give an *Assignment*; then it treats of the *Demand* of *Inheritance*, and of the *Complaint* against an *undutiful Testament*.

The Sixth treats of *Real Actions*, by which Private Persons recover their own; which *Actions* may be *Civil* and *Direct*; or *Pratorian* or *useful*.

The Seventh is of *Personal Services*.

The Eighth treats of *Real Services*, both in *City* and *Country*.

The Ninth speaks of *Personal Actions*, which are in *Imitation* of the *Real*; as *Actions* for a Fault or *Crime* committed by a *Slave*, the *Action* of the *Law Aquilia*, and upon Occasion of this last, at the End of the Book, of the *Action* against such as throw out any thing into a *High-way*, by which any one is *wounded* or *damag'd*; and of the *Action* against such as hang any thing out of their *Window*, which may happen to damage such as pass by.

The Tenth Book treats of *mix'd Actions*; such as the *Action* of *Bounding* and *Buting*, the *Action* of *Partition* of an *Inheritance* or other particular Thing: After which, it treats of the *Action* called *Ad exhibendum*, which is preparatory to the *Real Action* above-mention'd.

The Eleventh Book speaks of *Interrogatories* upon *Facts* and *Articles*; after that, of such Matters as are to be heard before the same *Judge*: Then it treats of the *Slave* that is corrupted, or runs from his *Master*, or such as play at *Dice*, or such as *measure Land* and make a *false Report* of the Quantity; and lastly, of *Burials* and *Funeral Expenses*.

The Twelfth Book explains those *Personal Actions* by which it is concluded, that the *Defendant* shall be oblig'd to transfer the *Demesne* or *Inheritance* of any thing, such as the *Action* for a *Loan*, and some others, which go by the Name of *Condictio*, in its proper Signification.

The Thirteenth Book speaks also of some of these *Actions*; and then of a Thing *lent*, and of the Action of *Pawning*.

The Fourteenth and Fifteenth Books, treat of Actions arising from *Contracts* by which we are bound, altho' they were made by other Persons; and lastly, of the *Senatus-Consultum Macedonianum*.

The *Senatus-Consultum Velleianum*, Compensation, and the Action of Deposites, are the Subject of the Sixteenth.

The Seventeenth treats of the *Mandate*, and of *Society*.

The Eighteenth explains the Meaning of the Contract of *Sale*, the Covenants that are generally us'd therein; the Recision of this kind of Contract, and for what Reasons one may go from it; and upon whom the Gain or the Loss of the Thing sold is to fall.

The Nineteenth, in the First Part treats of Actions of *Bargains and Sale*, of Actions of *Hiring*, of the Action called *Aestimatoria*, of Permutation; of the Action called *Præscriptio verbis*, proceeding from innominate Contracts.

The Twentieth Book treats of *Pledges and Pawns*, of the preference of *Creditors*, and the Subrogation of the *Rights* of the *Oldest*, of the Distraction or Sale of Things engag'd or pawned, and the Extinction of the *Pledge* or *Pawn*.

The Twenty first contains an Explanation of the *Edile's Edict*, concerning the Sale of *Slaves and Beasts*; then it treats of *Evictions*, *Warrantees*, and the *Exception* of the Thing bought and deliver'd.

The First Part of the Twenty second, treats of *Usuries*, *Fruits*, *Dependencies*, *Accessories* to Things; then of *Proofs* and *Presumptions*, and of Ignorance of the *Law* or *Fact*.

The Twenty third is upon *Espousals*, *Marriage-Dowry*, *Agreements* made upon that Subject, and *Lands* given in *Dowry*.

The Twenty fourth goes upon *Donations* between Husband and Wife, *Divorces*, and recovery of the *Marriage-Portion*.

The Twenty fifth treats of *Expences* laid out upon the *Dowry*; of Actions for the Recovery of Things carry'd away by a *Wife* or other Person, against whom there is no Action of *Theft*; of the Obligation to acknowledge *Children*, and provide for their Maintenance; and lastly, of *Concubines*.

The Twenty sixth and the Twenty seventh Books, treat wholly of *Tutorships* and *Curatorships*; of the Actions which result from *Tutorships*, of Excuses of *Tutors*, and the Alienation of Goods belonging to *Pupils* and *Minors*.

The Twenty eighth Book is employ'd on the Subject of *Testaments*, the Institution and Disinheriting of *Children*, of the Institution of an *Heir*, of *Substitutions*, of Conditions requir'd in *Institutions*, and of the Right of *Deliberating*.

The Twenty ninth Book treats of the *Military Testament*, of the Acquisition of an *Inheritance*, opening of *Wills*, &c. and of *Codicils*.

The Thirtieth, Thirty first, and Thirty second, treat of *Legacies* and *Fiduciary Bequests* in general.

The Thirty third, and likewise the first Titles of the Thirty fourth, treat of particular *Legacies*; after which follows the *Catonian Regulation*, concerning *Legacies* reputed never to have been made, and those that are taken away from unworthy Persons.

The Thirty fifth speaks of *Legacies* left upon Condition, and of the *Law Falcidia*.

The Thirty sixth Explains the *Senatus-Consultum Trebellianum*, made for the sake of *Fiduciary Bequests*; then it treats of the Time when *Legacies* and *Fiduciary Bequests* become due, and of the *Caution* the Heir is oblig'd to give for the Security of *Legacies* and *Fiduciary Bequests* left upon Condition; and of the *Seizure* thereof, for want of such *Caution*.

The Thirty seventh Book, speaks first of *universal Succession* to a deceased Person's Estate, to which any one is called by the *Prætor*, and goes by the Name of *Bonorum possessio*; after which it treats of the Collation of Goods and *Dowry*, and the Right of *Patronage*.

The Thirty eighth Book begins with the Explanation of the Services, due from *Freed Men* to their *Patrons*; then it treats of Matters which relate to the Succession of *Freed Men*; after that, of the Succession of *Intestates*, appointed by the *Prætor*; and lastly, of *Domestick* and *Legal Heirs*, and of the *Senatus-Consulta Tertullianum* and *Orphitianum*.

The Thirty ninth Book, first explains the Means which the *Law* or the *Prætor* furnishes to prevent any ones receiving Damage, where a *Personal*, *Real*, or *Mix'd Action* will not lye; these means are, Complaint of a New Work, *Cautio Damni*

Damni infecti, and the Action *De Aqua pluvia arcenda*; after which, it ends with the Explanation of *Donations*, that take Effect during the Life of the *Donor*; and such as are made in View of *Death*.

The Fortieth Book relates only to *Manumissions*, by which *Slaves* were set at Liberty.

The Forty first treats of the different Ways by which the Property of Things are acquir'd, according to the Law of Nations, and of the Acquisition of *Possession*; then of *Prescriptions*; and lastly, of *Lawful Causes* which authorize a *Possession*, and consequently make it capable of *Prescription*.

The Forty second treats in the first Place of Things *adjudg'd*, of definitive and interlocutory *Sentences*, of *Confessions* in *Judgment*, of the *Cession* of Goods, of the Causes of *Seizure*, and their Effects; and of the Privileges of *Creditors*: After that, it speaks of a *Curator* appointed for the Administration of Goods, and of the Revocation of *Acts* done to defraud Creditors.

The Forty third treats of *Injunctions* and *Possessory Actions*.

The Forty fourth, first treats of *Exceptions* and *Defences*; and then of *Obligations* and *Actions*.

The Forty fifth of *Stipulations*.

The Forty sixth of *Sureties*, *Novations* and *Delegations* of *Payments*, and *Discharges* of *Acceptilations*, *Stipulations*, and some *Cautions*.

The Forty seventh, is of *Private Faults* or *Offences*.

The Forty eighth begins with *Publick Judgments*, then follow *Accusations*, *Inscriptions*, *Prisons*, and all *Publick Offences*; from thence it passes to the *Senatus-Consultum Turpillianum*, and Abolition of *Crimes*; and lastly, it treats of the *Torture*, *Punishments*, *Confiscation*, *Relegation*, *Deportation*; and of the *Bodies* of *Malefactors* executed.

The Forty ninth treats of *Appeals*, and Matters relating thereunto; after which, it gives an Account of the Rights of the *Exchequer*; of Matters relating to *Captives*, *Military Discipline*, *Soldiers* and *Veterans*.

The Fiftieth Book treats of the Rights of *Cities* and *Citizens*, of *Magistrates* and their *Children*; of *Publick Offices*; and the Causes which exempt Persons from them. And also of the Right of *Immunity*: After which, it speaks of *Deputies* and *Embassadors*, of the Administration of Things

belonging to *Cities*; of *Publick Works, Fairs, Pollicitations*, Judgments given in extraordinary Cases by *Magistrates*; of *Brokers and Factors*, of Taxes laid upon the *Provinces*; and lastly, it ends with the Interpretation and Signification of the *Terms*, and with the Rules of the *Law*.

Besides this Distribution of the *Digest* into Fifty Books, of which we have here given an Account, this Work was again divided into *Seven Parts*; but the Reason that induc'd the Emperor to make this Division is not known: Some pretend it was done to separate the different Matters, and take in all that related to one Subject into one Part, consisting of several Books. Others attribute it to the Superstitious Respect of the Ancients to the Number *Seven*, as the most perfect; [Vide *Macrobium in somnium scripionis*.] However that be, the First Part, containing the *Commencement of Suits*, makes up the first Four Books.

The Second begins at the Fifth, and ends at the Twelfth.

The Third goes from the Twelfth to the Twentieth.

The Fourth consists of Eight Books, and ends at the Twenty eighth.

The Fifth begins at the Twenty Eighth, and ends at the Thirty seventh.

The Sixth takes in Eight Books, ending at the Forty fifth.

The Seventh is compos'd of the Six last.

There has been another Division of this Work, made since the Emperor *Justinian's* Time, into the *Old Digest*, the *Infortiate Digest*, and *New Digest*.

According to this, the *Ancient Digest* goes as far as the Third Title of the Twenty fourth Book, where the *Infortiate* begins, and ends at the Thirty ninth Book; and the *New Digest* comprehends the Twelve last.

This Division had not the Emperor's Sanction, is imperfect, and without any Foundation: Nevertheless, it has been observ'd in those Editions of the *Digest*, which have Glosses. This is thought to be owing to some Writers, who not being able to write the whole Work in one Volume, divided it into Three, without care to make an exact Division, according to the Subject-Matters and Titles; and the Names they have given them, would make
one

one believe, that they were not compos'd and publish'd all at the same Time; and contain'd the *Answers* of the *Lawyers*, with regard to the Order of the Matter, but not according to the Order of Time.

C H A P. XXI.

Of JUSTINIAN'S *Institutes*.

WHILE the *Digest* was composing, the Emperor laid his Commands upon *Tribonian*, *Theophilus* and *Dorotheus*, to make an Abridgment of the first Principles of the *Law*, for the Benefit of young Students, who should have a Mind to apply themselves to that Science.

These Three Persons were so diligent, that in the Year 533, this Collection was publish'd, under the Title of *Institutes*. It came out about a Month before the *Digest*; the *Institutes* being publish'd the Twenty first of November, 533; and the *Digest*, not till the Sixteenth of December following: Which has given occasion to *Zoezius* and some other Doctors, to be of Opinion, that the *Law* of the *Digest*, being publish'd after that of the *Institutes*, ought always to prevail whenever any contrariety appear'd.

The *Institutes* then, which are only the first *Elements* of the *Roman Law*, were compos'd at the Command of the Emperor JUSTINIAN, by *Tribonian*, *Dorotheus*, and *Theophilus*, who took them from the *Writings* of the Ancient *Lawyers*; and chiefly from the *Institutes* and other *Writings* of *Gaius*; especially from his Books called *Aureorum*, that is, *Of Important Matters*.

They had the Force of *Law*, given them by the same Emperor's *Constitution*, which is plac'd at the Head of the Work by way of Preface.

Why these first *Elements* of *Law* are called *Institutiones*; is obvious enough: I have translated it by the Word *Institutes*, because the *French* Word *Institut's*, is not expressive enough of the Signification of the *Latin*; the Reason whereof is, that by *Institutes* is naturally understood

the first Principles of a Science : So that as the *Latin Word Instituta*, which signifies the *Customs* or *Laws* of a Country, is not us'd in this Sence ; so the *French Word Instituts*, is never made use of to signify the first Principles of a Science, which are not to be express'd but by the Word *Institutes*, or *Institutions*.

This Work, as well as the *Digest*, is a Master-piece in its kind, which cannot be too often read, or too diligently study'd, by those who have already made some Progress in the *Law*: Nay, even such as are far advanc'd in it, always reap great Advantage by the perusal thereof, because it contains an Abridgment of the first Principles of that vast and sublime Science. Therefore it is a common Saying, that *He who is Master of the Institutes, bids fair to be a great Lawyer*. There is another thing, which is, That as it is impossible to retain all one reads, so 'tis a very great Advantage to one that Studies the *Law*, to have so precise and exact an Abridgment thereof. When once one understands it thoroughly, 'tis no hard Matter to retain it ; provided it be carefully read over from time to time, which the ablest Judges and best Lawyers do, being perfectly sensible of the use it is to them, to be conversant in the Principles of the *Roman Law*, which, as we shall shew hereafter, are the Basis and Foundation of ours.

The *Institutes* are divided into *Four Books*, each Book into several *Titles*, and every Title into several *Parts* ; the First is called *Principium*, as it is the Beginning of the Title, and those which follow, *Paragraphs*.

The First Book of the *Institutes* has Twenty six Titles, the Second Twenty five, the Third Thirty, and the Fourth Eighteen. Before I enter upon the Order of the *Titles* of this Work, it is to be observ'd, that the *Law* has Three Objects, PERSONS, THINGS and ACTIONS, which make up the Subject Matter of the Four Books of the *Institutes*. The first Book treats of the Right of *Persons* ; the Second, Third, and Five first Titles of the Fourth, of *Things* ; and *Actions* are the Subject treated of, from the Sixth Title of the Fourth Book, to the End.

The First Book treats of PERSONS, but it is from the Third Title only ; for the Two first, which are by way of Preliminaries, explain what *Justice*, *Law*, and *Right* are ; after which, the meaning of the *Right* or *State of Persons*, is

is explain'd under Two Divisions, which make up the remaining Part of the First Book.

According to the chief Division of Persons, treated of from the Third Title of the first Book to the Eighth; Men are either *Free* or *Slaves*.

The Condition of all *Slaves* is the same, but it is not so with *Freemen*; whereof some are *Free* by *Birth*, others are made so by *Emanicipation*, which is null, when contrary to *Law*.

The Second Division of Persons, begins at the Eighth Title of the First Book, and is explain'd in the following Titles of the same. It is of Persons independent; and of such as are under the Power of another, that is, a *Master* or a *Father*.

The Emperor therefore, first speaks of the Power of *Masters* over their *Slaves*, then of *Fathers* over their *Children*; after which, he shews the manner of acquiring Paternal Power, viz. by *Marriage*, *Legitimation*, and *Adoption*: And then, how that Power may be dissolv'd.

From the Thirteenth Title, to the End of the First Book, He speaks of Persons that are Independent, I mean, *Pupils*, or such as have *Tutors*; of *Minors*, or such as have *Curators* appointed them; and lastly, of Persons that are of Age, subject to no body, and Masters of their own Rights: Wherefore, all the Remainder of this Book turns upon *Tutor* and *Curatorships*.

The Emperor particularly explains Three things which concern *Tutorship*; the First is the Definition or Division thereof into *Testamentary*, *Legal*, and *Dative*; the Second, is the Effect of the *Tutorship*, which consists in putting the *Pupil* under the Care of his *Tutor*; so that he may do nothing that will bind him, unless the Authority of his *Tutor* intervenes at the very Instant when the Act is pass'd by the *Pupil*: The Third thing concerns the manner how *Tutorships* end or expire.

After this, in the Twenty third Title, He treats of Matters relating to *Curators*; and in the three last of this Book, speaks of three things common to *Tutors* and *Curators*; which are the Security they are oblig'd to give, to indemnify *Pupils* and *Minors*; the Lawful Causes exempting them from being *Tutors* or *Curators*; and lastly, those for which they may be depriv'd of their Offices.

From *Persons*, the Emperor passes to *Things*; of which he treats, from the First Title of the Second Book, to the Sixth Title in the Fourth.

He explains three Points concerning Things, their *Divisions*, the ways of *acquiring* them, and *Obligations*; that are the Means by which Things become due to us.

As to the *Divisions*, he makes them principally Two; by the first, Things are either *in Commerce* or *out of Commerce*; by the second, they are *Corporeal* or *Incorporeal*.

In Relation to the Second, we shall observe, that the Property of Things is acquir'd either by the *Law of Nations*, or the *Civil Law*.

The ways of acquiring introduc'd by the *Law of Nations*, are explain'd in the First Title of the Second Book.

The Second Title explains the Second *Division* of things, which are either *Corporeal* or *Incorporeal*; upon which, the Emperor takes occasion to treat of *Real* and *Personal Services*, as being *Incorporeal Things*.

From thence he passes to the Ways of *acquiring*, introduc'd by the *Civil Law*. Whereupon we are to observe, that the Property of Things, according to the *Civil Law*, is acquir'd either by *Particular* or *Universal Title*.

The Means of acquiring in the *Civil Law* by Particular Title, are *Adjudication*, *Usucaption*, or *Prescription*; and the Express Disposition of the *Law*, which transfers the full Right of a Thing, as a *Donation* in prospect of Death, resembling a *Legacy*, the Property whereof passes to the *Donee* without Delivery. Then the Emperor in the Sixth Title speaks of *Usucaption*, or just *Usurpation*, and the Conditions which it requires; and in the Seventh Title, of *Donations*.

After that, He goes upon *Persons* who have the Power of *Alienating*, and such by whose Means another may acquire any thing.

The Ways of acquiring the Property of Things, according to the *Civil Law*, by Universal Title, are *Inheritance*, the *Prætorian Succession*, called *Bonorum Possessio*, Acquisition by *Adrogation*, *Adjudication* of the Goods of a deceased Person, in Favour of Liberty bestow'd upon *Slaves*; Succession by *Publick* and *Open Sales*, and the Succession called *Miserable*; these Six Ways are explain'd from the Tenth Title of the Second Book, to the Fourteenth of the Third.

As every Succession is either *Testamentary* or *Legal*, and the *Legal* takes place only in defect of the *Testamentary*: The Matter of *Testaments* is explain'd from the Tenth Title of the Second Book to the End thereof, and may be reduc'd to Three principal Articles.

The First relates to the Four Conditions requir'd to make a *Testament* valid; whereof the first is, that it be made in the Form prescrib'd by the *Laws*; from which, however, the *Military Testament* is exempt: Secondly, the *Testator* must be intitled to the Power of making a *Will*; Thirdly, He must either institute or disinherit those Children that are under his Power; Fourthly, He must institute an *Heir*; for without that, there can be no *Testament*: Now the Institution may be to the first, second, or third Degree: That in the First, is called properly *Institution*; that in the Second or other Degree, is termed *Substitution*; and it is divided into *Vulgar*, *Pupilar*, and *Quasipupilar*.

The Second Article shews, how many Ways a *Testament* duly made, may afterwards become null; which is the Subject Matter of the Seventeenth and Eighteenth Titles of the Second Book.

The Third shews how a *Testament* made in the Form prescrib'd by *Law*, and not invalidated may have its Execution; which is done by the *Heir's* entring to the Succession: Now this may be done several ways, according to the different Qualities of the *Heir*; for some are *necessary Heirs*, others are both *necessary* and *sui Heredes*, and others *extraneous Heirs*.

The entring to Inheritance, makes the *Heir* liable not only to the Debts of the Deceas'd, but to the Deliverance of *Legacies* and *Fiduciary Bequests*; which are therefore the Subject of the Second Book, from the Twentieth Title to the End.

In the first Place, the Emperor explains the Meaning of a *Legacy*; what Actions a *Legatee* may have on Account of the *Legacy* left him; what things may be dispos'd of by *Legacy*, and to whom: Then he shews how *Legacies* are taken away or transferr'd; and lastly, what Diminution they receive by the *Law Falcidia*.

As to *Fiduciary Bequests*, He treats of them in the Twenty third and Twenty fourth Titles: In the First of these, He explains the Nature of the universal *Fiduciary Bequest*, called *Inheritance by Fiduciary Bequest*; and in the other, He explains what a particular *Fiduciary Bequest* is: After which, in the last Title of the Book, He speaks of *Codicils*.

Testamentary Successions, which take place before all others, being explain'd in the Fifteen last Titles of the foregoing Book; the first Titles of the third Book, treat of *Legal Successions*, which are admitted only in default of *Testamentary*.

According to the Ancient *Law*, there were but two kinds of *Legal Heirs*: For by the Disposition of the *Law* of the *Twelve Tables*, the *Legal*, or Succession to *Intestates*, fell only to two sorts of *Heirs*; which were, first *Heredes sui*, or *Domestick Heirs*, and in default of them, to the next of Kin by the *Father*; which makes the Subject Matter of the two first Titles of this Book.

In process of time, there came to be another *Legal Succession*, appointed by the *Senatus-Consulta Tertullianum* and *Orphitianum*, of which mention is made in the Third and Fourth Titles.

The Fifth treats of the Succession of *Intestates*, to which the *Cognati* were called by the *Pratorian Law*; every one according to the Degree of Parentage: This leads the Emperor to speak of the Degrees of Kindred in the Sixth Title; after which, He considers those which were excluded from this *Pratorian Succession*, because they were no otherwise ally'd to the deceas'd, than by a servile Relation.

The *Succession of Freeman*, is the Subject of the Seventh Title; and the *Assignment of Freeman*, that of the Eighth.

After the Emperor has explain'd the Matter of *Succession*, which, according to the *Civil Law*, is the first way of acquiring the Property of Things by *Universal Title*, He proceeds to the other Five; which are the *Pratorian Succession*, called *Bonorum Possessio*, Acquisition by *Adrogation*, *Adjudication* of the Goods of a deceas'd Person, in favour of Liberty conferr'd upon *Slaves*, the Succession which accrues by *Publick Sales*, and that called *Miserable*: All which are treated of, from the Ninth to the Fourteenth Title.

Then

Then he comes to the last Point relating to *Things*, viz. **OBLIGATIONS**; which are the Means whereby Things become due to us: First he shews what an *Obligation* is, and the Causes that produce a *mix'd Obligation*; that is, partly Natural and partly Civil; as a *Contract*, *Quasi-Contract*, *Crime* or *Offence*.

As touching *Contracts*, some are called *Nominate*; that is, distinguish'd by certain proper Names, authoriz'd by the *Law*, which allows them a particular Action; others are called *Innominate Contracts*, having no special Name or particular Designation, and are form'd only by one of the Parties, fulfilling the Agreement.

Nominate Contracts are form'd Four ways, by *delivery* of the Thing agreed for, by *solemn and formal Words*, by *Writing*, and by the sole *Consent* of the Contractors.

Nominate Contracts, made by the Delivery of any thing, are the *Loan*, *Deposit* and *Pawn*, which are treated of in the Fifteenth Title.

Contracts made by *Words*, are called *Stipulations*; the general Principles of which, are first unravell'd, in order to come to the chief Divisions of that kind of *Contract*.

The First is of the *Stipulation* made between the Person who Demands, and him that Promises; and of that made between several that stipulate or promise.

The Second is of the *Stipulation* made by *Free Persons* or *Slaves*.

The Third of *Stipulations* that are called *Judicial*, *Prætorian*, *Common* or *Conventional*.

The Fourth of *Stipulations* called *Useful*, or good in *Law*; and of *Stipulations* that are *Unuseful*.

The Fifth is of Principal and Accessary *Stipulations*, called *Sureties* or *Cautions*.

The Twenty second Title treats of *Written Contracts*.

The Five following *Titles*, explain *Contracts* made by the sole *Consent* of the contracting Persons; which are the *Contract* of *Purchase*, of *Hire*, of *Partnership*, and of the *Mandate*.

The Twenty eighth Title treats of *Quasi-Contracts*; the next shews how *Obligations* are to be acquir'd; and the last, after what manner they may be extinguish'd.

Having spoken of *Obligations*, which arise from *Contracts* or *Quasi Contracts*, the Emperor proceeds in the Five first *Titles* of the Fourth Book, to treat of *Obligations*, that spring from *Faults* and *Quasi-Faults*.

The rest of the Book, from the Sixth *Title* to the Sixteenth, is employ'd in treating of *Actions*.

It begins with the *Definition* of an *Action*, which is follow'd by several *Divisions*, explain'd in the Sixth *Title*, according to the Chief and Principal of which, *Actions* are either *Real*, *Personal*, or *Mix'd*.

The Second is, of *Actions* deriv'd from the *Civil Law*, and such as have their Foundation in the *Prætorian*.

The Third is, of *Actions* by which the *Plaintiff* only pursues the Right of a thing belonging or due to him, and of those by which the Punishment of the *Offender* is only aimed at; and of such *Actions* by which both are intended.

The Fourth Division, is of *Actions* by which the *Plaintiff* sues for the Single, Double, Treble, or Quadruple Value of the Thing he would recover.

The Fifth is of *Actions* of *Good Faith*, *Strict Law*, and *Arbitrary Actions*.

The Sixth is of *Actions* in which the Total of what is due is sued for, and in which the *Defendant* is either not sued for the whole, or in Consequence of which, he is condemn'd to pay only as far as his Circumstances will allow.

After these Divisions of *Actions* are explain'd in the Sixth *Title*, the Seventh treats of certain *Prætorian Actions* which Men are liable to, and which proceed from *Contracts* made by *Slaves* or *Children* under their Power, or else by such Persons to whom they have committed the Management of their Affairs.

The Eighth *Title* speaks of *Actions* that may be brought against a *Master*, for a Fault done by his *Slave*.

The Ninth, of *Actions* to which the Owner is liable, for the Hurt or Damage done by a Beast.

The tenth, directs what Persons are to be employ'd in carrying on *Law-Suits*.

The Eleventh *Title*, treats of the Security requir'd of the Parties to a Suit, or such as appear for them.

Of the Second Edition of Justinian's Code. 93

The twelfth sets forth the Nature of temporary or perpetual Actions, and what Actions the Law affords to or against *Heirs*; what those are which lye in their Favour, and not against them; and lastly, those which are neither allow'd for nor against them.

The thirteenth treats of *Exceptions*, and the Fourteenth of *Replies*.

The Fifteenth of *Injunctions*, or *Actions* to put the Party injur'd into *Possession*.

The Sixteenth declares the *Penalty* of such as commence *Vexatious Suits*.

The Seventeenth prescribes Rules to be observ'd by Judges, in the several Suits brought before them.

And the Eighteenth and last, shews what were the *Roman Publick Judgments*, wherein every one had free Liberty of prosecuting; and of which, the Penalties were establish'd by the *Laws*, called *Judiciorum Publicorum Leges*.

C H A P. XXII.

Of the Second Edition of JUSTINIAN'S Code.

FROM what has been said, it follows, that in 529, the Body of the *Civil Law*, compos'd by *Justinian's Order*, consist'd only of the *Institutes*, *Digest* and *Code*; but the *Code* came out afterwards, with some Alterations: Besides, abundance of New *Constitutions* publish'd by this Emperor, produc'd in process of time, a Fourth Part of that Body of *Law* now in use; of which I shall give an Account in this and the following Chapter.

In the Year of Grace 529, the Emperor *Justinian* publish'd another *Code*, and suppress'd that which was put out by his command in the Year 529. He was sensible that in the first, there were many useless *Laws*, which decided the same Matter; others contrary to the present *Usage*, and that since the Publication of it, he had been oblig'd to make several *Ordinances*, which it was proper to insert in this Volume: And therefore, thinking it not below his Majesty
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94 Of the Second Edition of Justinian's Code.

to correct his own Work, He reform'd the first, and publish'd an Ordinance, *De emendatione Codicis Domini Justiniani, & secunda ejus editione*; which he directed to the Senate of Constantinople, to receive his New Code; declaring therein his Pleasure, that his last Code should have the Force of Law, and intirely rejecting the former: This last was intitled, *Codex repetita praelectionis*; that is, *Revis'd, Corrected, and Augmented*.

The Additions and Alterations in the Second Code, naturally lead me to speak in this Place, of those Two Sects of Lawyers, who began to be taken notice of in the Reign of Augustus; and continu'd till that of the Two Brothers, *Marcus Aurelius*, and *Lucius Verus*.

Altho' this Matter was touch'd upon in the Seventeenth Chapter, I thought it the best way to refer to this Place the particular Explanation thereof, which I shall now give; and the rather, because it discovers the Reasons of the greatest part of the Alterations made by Justinian in his Code.

These Sects were not distinguish'd by any particular Name, till long after they had carry'd their Disputes to a great length: Thus one was called the Sect of the *Sabinians*, from *Sabinus*, who was a Favorite of the Emperor *Tiberius*; the other had the Name of the Sect of *Proculians*, from *Proculus*, who liv'd under *Vespasian*: 'Tis held, that *Atticus Capito*, who was extremely attach'd to *Precedents* and *Old Customs*, was the Head of the *Sabinians*; and that *Labeo*, who did not confine himself to Rules, but follow'd the Dictates of Reason and his own Understanding, was the Head of the *Proculian* Sect.

Thus the *Sabinians* chose rather to stick to the Decision of the Law, than any Equitable Interpretation that might be drawn from it; and gave their *Answers* and *Decisions* according to the Rules and Principles they had learnt.

The *Proculians*, on the other Hand, without sticking close to the Rules and Principles of the Law, carefully examin'd all Questions propos'd to them; and being rather inclin'd to follow natural Equity, than the rigorous Decision of the Law, grounded their *Answers* upon their own Reason and natural Equity; thereby endeavouring to establish abundance of *New Principles*, contrary to the Rules of the *Ancient Law*.

Of the Second Edition of Justinian's Code. 95

However, this was not so general, but that it frequently happen'd otherwise ; and *Justinian*, affirming the Opinion of the one, and sometimes of the other Sect, sufficiently demonstrates, both were often agreeable to the Rules of Equity. *Atteius Capito*, *Masur*, *Sabinus*, *Cassius Longinus*, *Caelius Sabinus*, *Javolenus Priscus*, *Aburnus Valens*, *Tuscianus*, *Salvius Julianus*, were all of the *Sabinian* Sect.

Antistius Labeo, *Nerva* the Father, *Nerva* the Son, *Pegasus*, *Celsus* the Son, and *Neratius* the Elder, were of the Sect of *Proculians*.

These two Sects continu'd till the Reign of the two Brothers, *Marcus Aurelius* and *Lucius Verus*, so that all the Students of the Law, generally follow'd the Principles and Opinions either of the *Sabinians* or *Proculians*. But the Lawyers who flourish'd under these two Emperors, affected neither of these Parties ; and some who had gone before them had done the same, following their own Judgments, without any regard to either of the two Sects.

These Lawyers, who read the Writings of the *Sabinians* and *Proculians*, without prejudice to either, agreed with the Opinions of either Side, as they seem'd to carry in them more Reason and Justice ; nay, sometimes they endeavor'd by an equal Temperature to avoid the two Extremities, into which the two Sects, thro' too great Obstinacy, had fallen ; and this got them the Name of *Eriscondi*, which comes from *Erisco*, to Divide : Because they made use of the Opinions of both Sides, in order the better to form their own.

As neither of these Sects wanted strong Reasons to support their Opinions, it often happen'd, that the Judge being hard put to it to determine between them, apply'd himself to the Emperor for his Decision ; and several Emperors have decided Questions, upon which these two Sects had given contrary Opinions : But notwithstanding, there remain'd so great a number of Cases contested by the two Sects, that whilst the *Digest* was composing, the Emperor made several Ordinances, to decide part of them ; these being Fifty in number, were called *Justinian's Fifty Decisions* : And as he thought it proper to insert them in his Code, so he resolv'd at the same time to correct it, and retrench some *Constitutions* which seem'd useless ; adding

ding, thereto these Fifty Decisions, and some other *Constitutions*, which were not in his First *Code*.

This new Edition of the *Code*, was publish'd in the Year of Christ 534, under the Title of *Codex Justinianus repetita praelectionis*, as is before observ'd ; and is the same that is now in use.

As to *Justinian's* Fifty Decisions, they being mix'd with the rest of the *Laws*, 'tis not an easie Matter to distinguish all of them, nor are our Authors agreed upon that Point : [See the *Treatise* written by Merillus upon that Subject.]

But we must not forget that the *Institutes* came out in 533, and consequently before the *Code* just now mention'd ; which is the Reason, that altho' the *Fiduciary Tutorship* of Brothers was abolish'd by the last *Law*, §. 1. *Cod. de Legit. habed.* there is no notice taken of it in the *Institutes*, under the Title *De Fiduciaria Tutela* ; that *Law* being posterior to them, and not publish'd till 534.

C H A P. XXIII.

Of Justinian's latter Constitutions, called Novels.

DURING *Justinian's* Life, the Body of the *Civil Law* consisted only of Three Parts, the *Institutes*, *Digest*, and *Code* ; but after his Death, the Fourth Part was compos'd out of his *Constitutions*, called *Novels*.

So that this Emperor's *Novels* are his last *Constitutions*, made after the Publication of the Second *Code* ; and which compose the Fourth and last part of the *Civil Law*.

This Emperor then, made several *Laws* posterior to his Second *Code*, at several times, and upon divers Subjects, as Occasion requir'd.

Some Interpreters have thought these *Constitutions* were called *Novels*, as introducing a *New Law*, contrary to that of the *Digest* and *Code* : But they have no ground for this Opinion, since all the *Novels* are not repugnant to the *Laws* of those Two Collections ; we must say with *Cujacius*, that they were so called, *Quasi Novae Constitutiones*

stitutiones & post *Codicem Justiniani*, *repetita praelectionis promulgatae*. In the same manner, some of the *Constitutions* of the Emperors *Theodosius*, *Valentinianus*, *Martianus*, *Leo*, *Majorianus* and *Severus*, were also called *Novels*, because they were made after the *Theodosian Code*; in Imitation of which, *Justinian* gave the same Name to certain *Constitutions* by him made, between the Publishing of the Two Codes; *L. 1. §. Sed cum Novella C. de emendat. Cod. l. Siquis filium in fine C. de inoff. Testam.* And in short, this Name has been given to the *Constitutions* of several Emperors who came after *Justinian*.

As to those made by the Emperors who preceded him, it is to be observ'd, they had not the Authority of Law, after the Collection made by his Order; He having in his *Edict* for the Confirmation of the *Digest*, declar'd, that no *Laws* or *Ordinances* which were not comprehended in the Collection publish'd by his Authority, should be of any Force; forbidding all *Lawyers* to quote or make use of them, and the *Judges* to have any regard thereto.

Nevertheless, these *Novels* are not altogether useless; for as *Justinian's Code* was chiefly compos'd of the *Constitutions* taken out of the *Theodosian*, and the *Novels* of some of *Justinian's* Predecessors, they may be of great service towards understanding those of which *Tribonian* has reported only a Part.

To return to *Justinian's Novels*, it is to be observ'd, that this Emperor after having made his *Code*, which has in it a vast number of his own *Ordinances*, was oblig'd to make New *Laws*, upon occasion of some *Cases*, not been decided; or to abrogate the Old ones, according to the Circumstances of the Times: For all *Laws* have their Original in the Publick Advantage, which alters according to the present Variety of Circumstances.

In short, many of these *Novels* were made only to confirm and enforce the Ancient *Laws*, that were become obsolete, by the Alterations to which all Human Affairs are subject.

Thus amongst this Emperor's *Novels*, some were design'd to establish a New Law, others to confirm the Law whereof the Use was uncertain; and some to correct the Ancient Law, or reform the Whole or in Part.

Altho' *Tribonian* was often employ'd in making of the *Novels*, there is room to believe, *Justinian* made use of several other Hands on those Occasions; which is to be perceiv'd, by the Difference of the *Stile* they are writ in: However that be, 'tis certain he reap'd great Advantages from several of those which were of his Composition; and it is believ'd, He very much enrich'd himself by introducing a *New Law* contrary to the *Old*; or by deciding Disputes, upon which Suits had been before commenc'd; which is the Reason that many of the *Novels* are rejected in our *Provinces*, where the *Civil Law* is receiv'd.

All these *Novels* were either directed to *Magistrates, Bishops, or Citizens* of *Constantinople*, and were of equal Force and Authority; forasmuch as by those directed to *Private Persons*, they are enjoin'd to have them proclaim'd, and see them executed according to their Form and Tenour.

After *Justinian's* Decease, which happen'd in the Year of Christ 566, in the Eighty second of his Age, and Thirty ninth of his Empire, some part of his *Novels*, which were dispers'd here and there, were collected and reduc'd into one Volume, together with Thirteen of his *Edicts*; all which make up the Fourth and last Part of the Body of the *Civil Law*.

The greatest part of these *Novels* were written in *Greek*; because the Seat of the Empire was then at *Constantinople*, where few or none spoke the *Latin Tongue* in Perfection: Yet, some of them were publish'd in *Latin*, and have been taken notice of by *Antonius Augustinus*.

There are Four *Latin* Translations of the *Novels*.

The First, whose Author is not known, appear'd just after *Justinian's* Death, as *Contius* proves in the Preface, which he made in 1559, at the Beginning of this Collection. *Contius Alciatus* and many others, call this a *barbarous Translation*; and the Famous *Du Moulin*, in his Treatise of *Usury*, Q. 1. Number 67. says, That the Author of it was not very expert in the *Latin Tongue*. Nevertheless, *Cujacius* in his *Observations*, lib. 4. cap. 38. commends him very much, shews his Learning in many Passages, and says, that his Translation is better than any since undertaken; He allows that many Faults have slipp'd into the several Editions, but imputes them to the Press, and not to the Translator.

Leunclavius, in *Notæ ad Parat. Autor. Græcor. Lib. 2. Not. 244. Vers. multis in locis*, also proves, that this Translation is in many Respects, more ample and correct than the others.

But be that as it will, 'tis no wonder this Translation abounds with Barbarous Expressions and unpolite Terms, for it is made Word for Word; which way of translating will not allow the Language to be either, very Elegant or Poëtic: *Habet omnis lingua sua quædam propria genera locutionum, quæ cum in aliam linguam transferantur videntur absurda.* "Every Language, says *St. Augustine*, has its Idioms, which when translated into another seem absurd." *Lib. de vera Relig. cap. 30.*

The Second Translation, which came out almost at the same time as the First, is a *Latin* Paraphrase, made by *Julian*, Professor of Law at *Constantinople*; who liv'd under *Justinian*, and several other succeeding Emperors: This Abridgment, called *Julian's Novels*, consists only of the Decisions contained in *Justinian's Constitutions*, by way of Paraphrase; but is so much the more valuable, as the Author liv'd in *Justinian's* Time; and was in great Reputation at *Constantinople*, for his exquisite Knowledge in the Laws. 'Tis true, He did not follow *Justinian's* Order, in the Second Law of the Code, *De veteri Jure enucleando*; which was to translate the Laws Word for Word, and not otherwise: Yet certainly he is very excusable, for having omitted all that was useless, and kept only to the Emperor's Decisions, which he often explains after the best manner, without deviating from their genuine Sense. So that when there is any Difficulty in a *Novel*, recourse must be had to this Paraphrase, which has the Character of being very Faithful and Exact.

The Third Translation is that of *Haloander*, printed first at *Norimberg* in the Year 1531, and since re-printed at several Places.

The Fourth and last, which is very much valu'd, is that made after *Seringer's Greek Copy*, printed at *Basse* by *Herwagenius* in the Year 1561.

The First, commonly called the *Vulgar*, is printed in the *Civil Law* Courses, either with or without Glosses, the Antiquity whereof, and unanimous Consent with which all the Interpreters of the Law have generally receiv'd it, renders it very valuable: Besides, as all Nations ac-

knowledge it for *Law*, when any Doubt arises upon the Text, there is no need to have recourse to the *Greek Original*; because, as *Contius* observes; this *Latin Version* was made from a *Greek Copy*, much more correct and perfect than that which we have.

The unhappy Wars and Incurfions of the *Goths* into *Italy* and *Greece*, occasion'd the utter Loss of *Justinian's Law*; but it was recover'd at *Malsi*; and *Imerius*, by the Authority of *Lotharius* the Second, in the Year 1130, restor'd the *Digest*, *Code*, and *Latin Version* of the *Novels*: Upon which, we are to observe, that it was very defective, and many *Novels* wanting, either because they could not be found, or were quite out of Date; as being calculated for particular Places, and therefore no part of the Common or General *Law*.

This First Version, contain'd only Ninety eight *Novels*; but *Holoander* and *Seringer* made up the Number One Hundred and Sixty five, out of the *Greek Book of Novels*; and *Cujacius* added the Three last, which make in all the present Number of One Hundred Sixty eight. *Mathew* the Monk, in his Preface, *Coll. Constit. Eccl. Græc.* affirms, that *Justinian* made One Hundred and Seventy; if so, there must have been Two lost. *Justinian's Epitomy* contains only One Hundred and Twenty eight; amongst which, there are Four of the Emperor *Justinus*, and Three of *Tiberius*.

This Volume was called *Authentick*, because *Justinian's* last *Constitutions*, therein, are of greater Authority than the rest; according to the Maxim, that when Two *Laws* are contrary one to the other, the last Repeals the first.

'Tis believ'd that about the Year 1140, some Interpreter chang'd the Order they were first plac'd in, and divided them into *Nine Collations*; which Word signifies a Heap or Jumble of several things together: But what Reason he had for making this Division does not appear, since there are *Constitutions* upon very different Matters, that have no Relation one to the other, in the same *Collation*; and which are in no other Order, than as he that divided them pleas'd. It were to be wish'd he had observ'd the order of Time, by which we might have easily distinguish'd those that made others Void; but he has thought fit to put them into *Nine Collations*.

Every *Collation* is divided into several *Titles*: and the Number of the *Titles* of a *Collation*, do not continue in the following *Collation*; so that the last *Title* of the First, is the Sixth *Collation*; and the Second *Collation* begins with the First *Title*, and is not the Seventh. But all these *Titles* are distinguish'd by the Number of *Novels*; for Instance, The First *Title* of the Second *Collation*, is the Seventh *Novel*.

Most part of these *Novels*, consist of a *Preface*, several *Chapters*, and an *Epilogue*.

In the Beginning or *Preface*, the Emperor explains the Reasons and Motives that induc'd him to make that *Constitution*; which is the Method observ'd in most of our *Royal Edicts*.

The Chapters contain several Decisions upon the Matter in question; and these Chapters are divided into many *Paragraphs*.

Lastly, in the *Epilogue*, the Emperor enjoins a strict Obedience to his *Constitution*, according to its Form and Tenour; in which manner, our Kings also conclude their *Ordinances*.

As the *Novels* are the last *Constitutions* and *Laws*, they are consequently not only of very great use, but absolutely necessary to such as desire a compleat Knowledge of the *Roman Law*. *Holoander*, in his *Epistle Dedicatory* to the Senate of *Norimberg*, which is at the Front of his Translation, amongst other things in Praise and Commendation of this Work, says, *That he prefers it before all the Riches of Kings and Princes*.

Towards the Year 1130, a *German*, called *Irncrius*, who had study'd at *Constantinople*, re-publish'd the first Translations of the *Novels*; in the close perusal whereof, finding some *Decisions*, which might relate to several *Laws* in the *Code*; which he compos'd *Summaries* or *Extracts* of several of those *Novels*, and inserted them in such Places of the *Code*, as those *Extracts* had any Relation to.

These, this Author plac'd at the End of such *Laws* as they wholly or in part Repeal'd, or to which they made any Addition, or gave any Explanation: These *Summaries* were called *The Authenticks*, by which Name they go at this Day. And to hinder these *Extracts* of the *Novels* being confounded with the *Laws* of the *Code*, they are printed in a different

Character. Nothing can better shew the Variations of the *Law*; for by their means, we may at once see the Amendments and Abolishments of the *Laws* of the *Code*, made by the *Novels*.

From what has been said, it follows, there is a wide Difference between the *Authentick* and *Authenticks*: The first being applicable only to the Collections of *Justinian's Novels*, the latter, to the *Extracts* of those same *Novels*: So that when any Difficulty arises about these *Authenticks*, it will be necessary to go back to the Fountain-head from whence they spring, in order to remove it.

The particular Account I have given of the Four Parts which compos'd the *Roman Law*, in the State it now is; and the Care I have taken to set down the exact Time when each of them was publish'd, sufficiently shew, that the *Novels* were not put out till after the other Three Collections: And therefore we ought not to be surpriz'd, there is no mention of them in the Preface to the *Institutes*; which was design'd to give an Account, of how many Parts the Body of the *Roman Law* consisted: But *Justinian* could say nothing of a Work, He had not then so much as projected.

Some of these *Novels* are not observ'd in *France*, even in those Provinces where the *Written Law* is followed; some, because they relate to particular Matters, which being quite out of use, or to which we are utter Strangers, are therefore intirely uselefs; others, because they are not agreeable to the Rules of Equity, and are thought to be dictated by *Tribonian*, as well as several *Laws* which bear *Justinian's* Name; inserted in the *Code* thro' a Spirit of *Avarice*, which the Antients lay to his Charge.

I have not here given the *Analysis* of this Work, as of the other Parts of the *Law*, because it is impossible to make a Methodical Succession of the Titles which compose it: Besides, that the same *Novel* contains several Matters which have no Coherence, there is no manner of Order observ'd in the Collection. And *Gothofredus* was oblig'd to make an Abridgment thereof, in order to put the Subject Matters of which it treats, into the same Order with the *Code*; which Abridgment is to be seen at the Head of his Edition of the *Novels*.

The Order I have propos'd, requiring I should shew what Authority the Body of the *Civil Law* was of in the *East* and *Western* Empires after *Justinian's* Death; the same shall be the Subject of the following Chapters.

C H A P. XXIV.

Of the Law observ'd in the East, after Justinian's Death.

THE Body of *Law* compos'd by *Justinian*, kept its ground in the *East* for Three Hundred Years after his Death, without suffering any other Alteration, than being translated into other Languages.

The *Digest* and *Code* were put into *Greek* in *Justinian's* Time; and after the Emperor's Death, one *Theophilus* (not he that compos'd the *Institutes*) made a *Greek Paraphrase* upon the same *Institutes*. The *Novels* also, written originally in *Greek*, were translated into *Latin*, as is observ'd in the preceding Chapter.

But Three Hundred Years after *Justinian's* Death, the Body of *Law* made by his Order, with so much Pains and Success, receiv'd several Changes, and was no longer follow'd in the *Eastern* Empire.

The Baseness of the Emperors, and their Jealousie of *Justinian's* Fame, made them study for a Pretence to destroy it; at first they gave out, that *Justinian's* Books were not alone sufficient, to answer all Difficulties that daily arose; and that the Method observ'd in compiling them wanted Exactness: After that, they made several *New Ordinances*, contrary to the *Roman Law*, and introduc'd particular *Customs*, with a View of abolishing it totally.

These *New Ordinances* and *Customs*, furnish'd the Emperor *Basilus* with a Handle to make a new Body of *Law*, which he set about towards the Year of Grace 880, but did not live to finish it. *Leo*, Sirnam'd the *Philosopher*, brought it to Perfection, and divided it into Sixty Books, which he publish'd in 886, under the Title of *Basilika*; in Honour,

as some think, of his Father, who was the first Projector; but others believe, they were so called, because they contain an *Imperial Law*, taken partly from the latter Emperors of *Constantinople*; the Word *Basilic*, signifying *Royal* or *Imperial*. [See the First and Seventieth of *Leo's* Novels, and *Cujacius's* Sixth Book of his *Observat.* Chap. 9.]

Constantinus Porphyrogeneta, *Leo's* Son, corrected, augmented, and put the *Basilicks* into better Order: About the Year 920 he publish'd them; and then they began to be in full Authority among the *Greeks*; the Truth whereof is so undeniable, that *Cujacius* says in the Seventeenth Book of his *Observations*, Chap. 31. *The Constitutions of the Emperor Leo were of no force, but as they agreed with the Basilicks.*

From that time, the *Basilicks* alone, with some *Epitomes* and *Abridgments* of the Law, and a few *Constitutions* of the Emperors who succeeded *Basilus*, made up the whole Law of the East; and continu'd so till the Reign of *Constantine XIII.* the last Emperor of the *Greeks*, in whose Time, *Constantinople* was taken by *Mahomet*, Emperor of the *Turks*, in the Year 1453; which put an End both to the *Eastern Empire* and its Laws.

But *Justinian's* Law was quite laid aside, long before, upon the Introduction of the *Basilicks* and *Epitomes* before-mention'd; and so desirous were the Emperors of *Constantinople*, to give a Currency to their own *Constitutions*, and encourage the Vulgar Tongue of the Countrey, in which the *Basilicks* were written, that *Justinian's* Books were utterly neglected, and scarce any Copies of them to be found in the East, for a long time before *Constantinople* was taken by the *Turks*.

Yet, some impure the Loss of *Justinian's* Books, to the Burning of *Constantinople*, under the Emperor *Xeno*, when above Six Thousand Volumes were destroy'd.

There are Two Things be remark'd of the *Basilicks*; The First, that they were partly compos'd of *Roman Laws*, translated into *Greek*, the use whereof had been preserv'd in the East: The Second, that after the taking of *Constantinople* by the *Turks*, they lay hid a long time.

Herpetus first publish'd Seven Books of them, then *Cujacius* Three more, and 'tis said he had them all; lastly, *M. Tabrot* put out a *Greek* and *Latin* Edition of Seven Volumes in *Folio*, which is held to be compleat enough.

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The *Grecian Lawyers* made many *Remarks* and *Commentaries* upon the *Basilicks*, which I have made use of, as well as of those by *Accursius*.

As to the *Novels* set forth by *Leo the Philosopher*, there are One Hundred and Thirteen of them, which are to be found translated into *Latin* at the End of the Body of the *Civil Law*, and we make use of them in *Cases* omitted by *Justinian*.

Besides, the *Basilicks* and *Novels* of *Leo the Philosopher*, the *Grecians* had many *Abridgments* of their *Laws*, which were more in Credit than the *Basilicks*: The First is the Manual of *Basilius*; the Second, *Michael Ataliatus's* Abridgment, called *The Abridgment abridg'd*; it came out in 1070. The Third is *Michael Pfellus's* Abridgment, publish'd about the same Time: The Fourth is, *The Epitomy of the Universal Law*, by *Harmenopulus*, put out about 1150. The Fifth, is the *Basilicks* of *Leunclavius*, which appear'd in 1570.

CHAP. XXV.

Of the Law observ'd in the West, after Justinian's Death.

THE Body of *Law* compos'd by *Justinian*, was at first only receiv'd by part of the Western Empire; for, except the City of *Rome*, *Sclavonia*, and some other Provinces, the *Roman Empire* had been swallow'd up by different Nations, to the most of which the *Roman Laws* were unknown; yet, in some Places, they were adopted by the *Goths*, *Burgundians*, and *Franks*; who having divided *France* among them, continu'd the use of the *Roman Law*, with a Mixture of *Laws* of their own making, suitable to their Manners and Genius; which Mixture remain'd after the Establishment of that Kingdom.

Alarick the Second, King of the *Goths*, perceiving the *Gauls* unwilling to submit to the *Gothick Laws*, order'd a Collection of the *Roman Laws* to be made for their use, which he publish'd in 506, under the Title of the *Theodosian Code*.

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And this is the *Code* mention'd by *Agathias*, when he says, The *Franks* and *Germans*, regulated *Contracts* and *Marriages* by the *Roman Law*; and that they were wont to make use of it in all Cases not decided by the particular *Laws* of *France*.

The Body of *Law* compos'd by *Justinian*, was in a manner wholly unknown to the greatest Part of the Western Empire, till the Time of *Lotharius II.* who found the *Pandects* at *Malsi*, about the Year 1130.

But since that, it has been receiv'd with great Applause by all *Europe*, quoted at the Bar, and taught publicly in the Schools; which ought not to be wonder'd at, being so agreeable to Right Reason and Equity, that 'tis look'd upon as the Rule of all good *Laws*, and Fountain of the true Principles of that Science: Therefore, several Nations are wholly govern'd by it, and others have recourse to it, when their own *Laws* or *Customs* fail. But all the Nations of *Europe* agree, in admitting no other *Law* to be taught in their Universities; and in several of them, the Degrees of *Doctor* or *Licentiate* in the *Law*, are indispensable Qualifications to intitle Men to be *Advocates* or *Judges*; as being the only Road to all Preferment in the Profession of the Long Robe; which shews the Value all Nations set upon this Body of *Law*, as soon as ever it came to their Knowledge.

This was the Fate of the *Roman Law*, after the Destruction of the Empire: It seems as if Providence had been particularly careful, in the Downfal of so vast and flourishing an Empire, to preserve this perfect Model of Justice and Human Prudence, for the good of Mankind. Herein one cannot sufficiently admire the Goodness of God, who in subverting the Throne of Emperors, still supported the Empire of the *Laws*; the very People who had shaken off the *Roman Yoke*, yielding to be govern'd by their *Laws*; and even those whom the *Roman Arms* had never reach'd, acknowledging the Power and Authority thereof.

Natural Equity, therefore, being the Foundation of this *Law*, inclin'd People to receive and have recourse to it; not thro' a Necessity of obeying, but Reason, which engag'd them voluntarily to follow it: *Non quidem ratione Imperii, sed imperio rationis*. In effect, this written Reason, drawn from the *Law of Nature* and *Nations*, ought not to be regard-
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Of the Use of the Roman Law in France. 107

ed as the particular *Law* of the *Romans*, but as the Common *Law* of all Nations.

But tho' *Justinian's Law* was unknown in the Western Empire, till the Time of *Lotharius* the Second, it must unquestionably have been known before in other Places; of which here are some uncontestable Proofs.

In the *Capitulars* of *Charlemagne*, we find the very Terms of *Justinian's Seventh Novel*, *De rebus Ecclesie alienandis vel non*. *Charles the Bald*, in his Answer to *Pope Adrian* the Second's Letter, makes use of the very Expressions in *Justinian's Hundred and Thirteenth Novel*. To conclude, *Ivo* of *Chartres*, in his *Decree*, quotes the *Pandects*, and gives the Definition of *Marriage*, in the very Words of the Fifth Paragraph of the Title upon that Subject in the *Institutes*.

C H A P. XXVI.

Of the Use of the Roman Law in France.

BEFORE I explain how far the *Roman Law* is admitted in *France*, it will be proper to shew how it was first receiv'd in this Kingdom.

After the *French* had subdu'd those People who were govern'd by the *Roman Law*, they suffer'd them still to continue the use thereof: And it is observ'd of the Kings of *France*, that they were not so Ambitious of having the Title of *Glorious Protectors of Liberty*, as of deserving it: Therefore, when the *Gauls* were intirely reduc'd to their Obedience, they permitted such as were govern'd before by the *Roman Laws*, to make use of them still.

Nay, it is held, that every one who commenc'd a *Suiz*, was oblig'd by the *Ordinances* of our first Kings, to declare at the Beginning of the Process, by what *Law* he design'd to pursue it. And it is also pretended, that certain Forms were prescrib'd by order of those Kings, to govern all Actions either according to the *Salick* or the *Roman Law*; and that *Judges Learned* in both, were appointed to determine

Dis.

108 *Of the Use of the Roman Law in France.*

Disputes, by the Rule of that *Law* to which the contending Parties were subject.

The *Roman Laws*, which at first were known only in a few Places in this Kingdom, in time spread themselves over other Provinces, which, till then, were wholly govern'd by their own particular *Laws* and *Customs*, by reason of the few *French Laws*, and their insufficiency to decide all Cases that arose : And as the *Roman Law* at all times had that great Authority which it deserves, and was even follow'd by many of the Nations the *French* had conquer'd, it was easily communicated to the rest, so that it was universally receiv'd in this Kingdom, but the use of it, in the several Provinces, has varied very much.

The Kingdom of *France* is divided into Provinces, some of which are called the Country of the *Written Law*, and others that of the *Customary Law*.

Those of the *Written Law*, are such as being in the Neighbourhood of *Italy*, were first conquer'd by the *Romans*, and last by the *French*, and had no other *Law* but the *Roman* at the Time they were subdu'd.

The Neighbourhood of *Italy*, not only gave them the Convenience of studying, but also an Inclination of conforming themselves to them. We reckon in the Number of these Provinces *Guyenne*, *Provence*, *Dauphiné*, and others ; in a Word, all those which are Dependiant upon the Parliaments of *Tholouse*, *Bordeaux*, *Grenoble*, *Aix*, and *Pau*, and several Provinces which depend upon the Parliament of *Paris*, viz. the *Lyonnois*, *Forrest*, the *Bauiolois*, and a great part of *Auvergne*.

As the People of these Provinces, were unwilling to submit to other *Laws*, than those to which they had been accustomed ; they obtain'd, thro' special Favour of our Kings, the Liberty of following the *Roman Law*, in Matters not determin'd by the *Ordinances* ; and tho' many *Customs* that were different from the *Roman Law* have been introduc'd among them, they are not very Opposite, nor of very great Extent : Besides, these *Customs* are only observ'd in those Places where they were introduc'd, and none of these Provinces have any other *Common Law* but the *Roman*.

But

Of the Use of the Roman Law in France. 109

But this is thro' the Prince's special Grant ; for every one knows, conquer'd Nations can have no other *Law* but that of the Conqueror ; nor any Power to make, adopt, or even retain their own *Laws*, without his leave : From whence it must be concluded, that the *Roman Law* does not derive its Authority in these Provinces from the Authors thereof ; but from the Grant of our Princes, who have thought fit to indulge their Subjects the Use of it. It is the same with *Customs*, which have not the Force of *Law* in the other Provinces, but by virtue of the Royal Authority, from whence they receive their Virtue.

In the Provinces of the *Written Law*, *Contracts*, *Wills*, and all kind of Affairs, are intirely regulated according to the *Roman Law* : And altho' some of them have been dismember'd from the Parliament of *Bordeaux*, and brought under the Jurisdiction of that of *Paris*, they have still had their *Law* preserv'd ; and all Disputes relating to them, altho' in the Parliament of *Paris*, are decided according to the *Roman Laws*.

The *Customary Country*, is the Provinces where the *Roman Law* is not receiv'd as *Law* ; being govern'd by their own particular *Usages*, which in process of Time, were reduc'd into Writing, by the Authority of our Kings. They are called *Customary*, because their *Customs* are their *Common Law* ; and the *Roman Law* is consider'd by them, only as *written Reason*.

In effect, the *Roman Law* not having been brought into those Provinces, till after a long time, was not adopted by them as a *Law*, which they were oblig'd to follow, but admitted as *written Reason*, to which they had recourse, when their own *Customs*, and the *Royal Ordinances* were silent.

The *Roman Law*, notwithstanding, is of very great use in the *Customary Provinces* ; and the Study of it there, no less requisite for a *Judge* or *Advocate*, than in the Countrey of the *Written Law* : For in Cases omitted by their *Customs* or *Ordinances*, they are oblig'd to consult and take their Measures from the *Roman Law*, in order to make their Determinations Just and Equitable : So that 'tis a Mistake to imagine, when the *Ordinances* and *Customs* have made no Provision, the Judge may give what Sentence he pleases ; and besides, it is contrary to the Nature of *Judgments*, which are to be govern'd by Certain and Uniform Rules ; and to
the

110 *Of the Use of the Roman Law in France.*

The Practice of many Ages, as well as the Opinion of our best Authors.

Such an Arbitrary way of proceeding, would introduce a dangerous *Ignorance* into our Courts, and disconcert the the whole *Judicature*: And indeed, to what can we more properly have recourse, than the *Roman Law*, which is the *Civil Law* of all well-govern'd Nations; and the Light that informs our Understanding; without which, our natural Faculties in most sorts of Business, would be nothing but Darkn^{ess} and Confusion: Therefore, a Judge should be well stock'd with *Right Reason*. I mean, the *Roman Law*, which is the true Source thereof.

The Judicious *Coquille*, one of the most Learned Interpreters of our *Customary Law*, says in his Preface to the *Customs of Normon*, " That the *Roman Law* ought only to be regarded as *Reason*; He adds, That the *Romans* excell'd both in *Arts*, and making *Good Laws*, for Governing their People in time of Peace: And therefore, we ought to make use of them, in default of our *Ordinances* and *Customs*." Which is also the Opinion of *Mornac*, one of our most celebrated *Lawyers*; who says, " That where *Custom* has determin'd nothing, *Tunc ad jus commune & Romanum confugimus*."

Loyseau, a very famous Author, in his Treatise upon Forfeitures of Copy-hold Estates, says, That the *Roman Law* is the *Common Law* of France; and it was a Maxim in his time, That Cases omitted by the *Customs*, ought to be decided by the *Roman Law*. So that before the *Customs* of *Paris* be extended to others, we ought first to examine, if the Question be not decided by the *Roman Law*.

M. le Pretre says, " That as the Emperor *Antoninus* said, the Earth was govern'd by his *Laws*, and the Sea by those of the *Rhodians*, as far as they were not repugnant to his; so the *Roman Law* governs in France, when the *Customs* and *Ordinances* are not contrary thereto."

Charondas, in his *Answers*, the famous *Argentre*, and *M. Richard*, all say, " We do not consider the *Roman Law* as an absolute *Law*, which of Necessity we are to obey; but we admit the Reason therein contain'd; and because of its great Equity, make use of it in default of our *Customs* and *Ordinances*, to govern our Determinations as far as our *Usage* will allow."

But

Of the Use of the Roman Law in France. III

But besides the Solidity of the Principles, and Equity which is observ'd to be in all the *Roman Laws*, and from which it would be dangerous to deviate, there is another Reason, that makes the Study of it absolutely necessary even in the *Customary Countries*; which is, that the *Roman Law* is universal, and comprehends the Decision of almost every Case that can possibly arise; whereas, the *Regulations* of the *Ordinances* and *Customs*, are confin'd to so narrow a Compass, that they are scarce sufficient to determine one Fourth of the Cases that arise: So that the Decision of the rest, which are without Comparison far the greatest part, depend absolutely upon the *Civil Law*; by which the Judges ought to give their Decisions; when it is conformable with Equity and Reason; else it would be useless, to oblige Officers of Judicature to answer upon *Law Questions*, before they can be admitted; and to qualify themselves with that Science, if the Study thereof would be of no use to them, in the Exercise of their Employments, nor observ'd as *Law* in their Determinations.

By the *Ordinances*, our Kings are contented to lay down general Rules for the Good Government of their Kingdom, to regulate the Power and Duty of their Officers, and cut off the dilatory Courses of the *Law*, by prescribing certain Rules for the Proceedings: So that the greatest part of the *Ordinances*, relate rather to the manner of carrying on the Process, than the Decision thereof.

Our *Customs* are almost all limited, to particular Matters, of which the *Roman Laws* take no cognizance; as *Fiefs*, *Seignorial Rights*, the Community of Goods, between married Persons; the Right of Redemption, Noble and City Ward, and some others.

On the other Hand, the *Roman Law* directs all Matters relating to *Contracts*, *Tutorships*, *Restitution* to the first State, *Obligations*, *Actions*, and a vast Number of other Matters, which are either not at all mention'd, or very lightly touch'd upon in the *Ordinances* and *Customs*.

Besides, it cannot be deny'd, but that in the Matters treated of both in the one and the other, there are many Articles borrow'd, or in Imitation of the *Roman Law*: From whence it follows, that neither the *Customs* nor *Ordinances* can be rightly understood, without the Help of the *Roman Law*; in respect of the Relation most of them have thereto.

112 *Of the Use of the Roman Law in France.*

thereto. Therefore, all our *French Lawyers* have fill'd their *Commentaries* with *Roman Laws*, to support their own Opinions ; and it was not possible for them to do otherwise, because both *Ordinances* and *Customs*, are for the most part taken from those *Laws*.

It is also certain, the *Roman Law* is the Model by which the best *Ordinances* of our Kings have been made ; and to which, consequently, recourse must be had for their Explanation. And, as they always employ'd the ablest Men in that *Law*, to draw up their *Ordinances*, 'tis no wonder they have such a Resemblance of that which their Authors were so full of.

It must also be agreed, that our *Customs* have been partly taken from the Principles of the *Roman Law* ; for in the Method they are at present, one may easily observe, they are nothing else but a Mixture of different *Laws*, which our Kings of the *First Race* suffer'd their Subjects to use, as they saw best. Now amongst these, the *Roman Law* was follow'd in many Particulars, and all the rest had a great deal borrow'd from it ; from whence it is called, the *Mother of the Laws* : And our *Interpreters* have always made use of it in their *Commentaries* upon our *Customs*, as the only Means to discover their true Sence ; whether it be upon Account of the Footsteps of the *Roman Law*, which are to be observ'd in most of them, or Exactness of the Principles which is peculiar to it.

It must then be agreed, that our *Customs* have been taken partly from it ; and that it is always made use of to interpret them : Wherefore, those who are most skill'd in the *French Law*, confess, that the greatest Part of our *Customs*, are nothing else but *Confirmations*, *Extensions*, *Derogations*, and *Restrictions* of the *Roman Law* ; to understand which, a perfect Knowledge thereof is absolutely necessary, in regard our *Customs* touch but very lightly upon Matters determin'd by the *Roman Law*.

For Instance, the *Custom of Paris* says, in *Article 185*. That *Compensation takes place in a clear and liquid Debt, of another equally clear and liquid* ; which agrees with the *Roman Law* : But it does not treat of the *Questions* that may arise upon that Subject. All the Sixth Title of that very *Custom* treats of *Prescriptions* ; but there are a vast Number of *Questions* whereof it makes no mention, and which must
be

Of the Use of the Roman Law in France. 113

be decided by the *Roman Law*. And if we observe, those who were employ'd in reducing or reforming our *Customs*, have treated at large of those Matters only, which are unknown to the *Roman Law*; taking very little notice of what is decided therein: By that means, pointing out to us, that we are to look for the *Decision* thereof in the *Roman Law*.

The same Observation holds good in the *Ordinances*; when they speak of Matters decided by the *Roman Law*; 'tis only *En passant*: For Example, the *Ordinance* of Lewis the Twelfth, of the Month of July, 1510. mentions the Causes of *Restitution* introduc'd by the *Civil Law*; but gives no Explanation thereof, which we are to look for there: And indeed, if *Restitutions* to the *First State*, are the mere Invention of the *Roman Laws*, Why should we not have recourse to the same in Matters of this kind; since it would be often impossible to decide them as we ought, if we vary'd from them?

'Tis true, as I have taken notice in another Place; our Kings in this Case, order us to seek our Remedy by *Royal Letters*; but they do not require the Judge to obey them, without Cognizance of the Cause, unless the *Damage* suggested, upon which the said *Letters* were granted, appears very plain. But pray, what *Damage*? Why the very same that is deduc'd and pronounc'd by the *Roman Laws*.

There was formerly a Famous Dispute between Mr. *Po-tier Lizet* and Mr. *Christopher de Thou*, concerning the Authority of the *Roman Law*, in the *Customary Countries* of France: The first maintain'd; it ought to be receiv'd as *Common Law*, where the *Customs* were silent; and that the defect of a *Local Custom*, ought not to be otherwise supply'd. On the contrary, the other was of Opinion, that the *Roman Law* ought to have no other Force than as *Written Reason*, which might be follow'd, or not, as was convenient; and that for want of a *Decision* of any Case, recourse was to be had, rather to the Neighbouring *Customs* than to the *Roman Law*.

But to speak impartially, this was a Question rather about the Name than the Thing it self; since *Reason* is the Soul of the *Law*, and the Rule of all *Determinations*: So that altho' the *Roman Law* were not to be regarded in the *Customary Countries*; as a *Law* to which we were absolutely oblig'd

114 *Of the Use of the Roman Law in France.*

oblig'd to submit; if it be receiv'd as a Rule to guide our *Judgments*, does it not follow, that a Judge ought to have recourse thereto, so far as it is agreeable to Equity; and may serve to determine the Dispute in Hand?

As to the Question, whether upon failure of the *Custom* of a Place, we should have recourse to Neighbouring *Customs*, or to the *Roman Law*, I think there is a Medium to be observ'd therein: In Matters that are merely *Customary*, the Neighbouring *Customs* or that of *Paris* may be consult'd; but in such as are directly deriv'd from the *Roman Law*, there can be no difficulty in the *Customary* Countries to have recourse to the *Civil Law*; not as the *Common Law*, since it is not so in those Parts of *France*, but as *Written Reason*, and as the Opinions of the most Learned and Wisest Men that ever liv'd; to whose *Judgments* that Deference is due.

Thus, as the *Roman Law* treats of abundance of Matters, not at all or but very lightly mention'd in our *Customs*, we may well say, that in such Matters the *Roman Law* is the *Common Law* of the *Customary* parts of *France*; but improperly, because the Judges are not oblig'd absolutely to follow it; and if they do, 'tis thro' *Reason* and not *Necessity*: Which has made *Brodeau* say, in his *Preface* to the *Customs of Paris*, "That the *Custom of Paris* is not easily extended to others, in Matters that have their Original and Foundation in the *French Law*, or partake of the *Common or Universal Law*: Such as the *Formality* in making of *Wills*, the *Legitime*, and others of the same Nature, not thoroughly discuss'd by our *Customs*; In which Case, this Author says, recourse must be had to the *Roman Law*."

We may also say, that our *Customs*, out of their own *Distribs*, are not properly the *Common Law* of the *Customary* Parts of *France*, in *Customary* Matters; especially in the Neighbouring Provinces: Nor are the Judges absolutely oblig'd to make it the Rule of their Determinations, in Cases that are omitted by the *Customs* of the Place, for any other Reason, than that the *Proximity of Places*, and near *Situations* and *Climates*, naturally produce a *Similitude of Inclinations* and *Manners*.

The Decretal Super-Specula explain'd. 115

Let us therefore conclude, that as to Matters of the *Roman Law*, tho', from what we have said before, the Judges are not absolutely oblig'd to make it their Guide; neither ought they to deviate from it, when it agrees with Reason and Equity: For not to make use of it as a *Common Law*, to supply the Defects of the *Municipal Laws*, would be to leave most Causes undecided; and by that means, introduce a kind of ambulatory and fluctuating Justice.

A more proper Occasion, doubtless, could not offer, to set forth the Excellence of the *Roman Laws*, and the Necessity all Judges and Advocates are under to make themselves Masters thereof, even in the *Customary Countries*; but this Subject deserves a separate Treatise, wherefore I shall make a particular Chapter of it, after having explain'd the *Decretal Super-Specula*, *titula Decretalium Privilegiis*; and the Sixty ninth Article of the *Ordonnance of Blois*.

C H A P. XXVII.

The Decretal Super-Specula explain'd.

AS some have upon very slender Grounds advanc'd, that teaching of the *Civil Law* publicly in the University of *Paris*, was prohibited for a considerable Time; I thought it would be proper to shew they are mistaken, and that the Publick Exercise of the Study of the *Roman Law*, was never discontinu'd in this Chief University of the Kingdom; either after the *Decretal Super-Specula*, or even after the *Ordonnance of Blois*: This was a Point that seem'd to challenge a Place in this Work; wherein I propos'd to insert every thing that any ways regarded the History of the *Roman Law*, and fully satisfy the Curiosity of the Reader in that particular.

No sooner were the *Pandects* discover'd, than they were admir'd by all Nations; and from that time, the *Law* compos'd by *Justinian* has been publicly profess'd in the City of *Paris*.

116 *The Decretal Super-specula explain'd.*

Irnerius was the First, who read Publick Lectures upon it at *Bologna* in *Italy*; from which Place, abundance of *Lawyers* dispers'd themselves all over *Europe*.

In *France*, it was first taught at *Paris*; where, about the same Time, there appear'd Three Great Men, who reduc'd the Study of Three of the most useful Sciences into a certain Method; viz. *Peter Lombart*, *Theology*; *Gratian*, the *Canon-Law*; and *Peter Comestor*, or the *Easter*, the *Sacred History*: All these Sciences were greatly encourag'd in that Capital City, from their first Appearance; and probably, were the Occasion of founding the University of *Paris*.

So that notwithstanding there can be no *Art* produc'd before the Year 1199, from whence the Incorporation of *Doctors* into a *Community* in this City may be prov'd; it cannot be doubted, but these Sciences were long before cultivated, and even from the Time of *Lewis le Gros*, who began his Reign in 1108.

Rigord, Chaplain to *Philip the August*, remarks, that in his Time, the Number of Learned Men was greater than ever it had been, either in *Rome*, *Athens*, *Alexandria* or *Egypt*, which were the most famous Theatres of Learning; as he mentions the *Civil Law*, we may conclude, not only that, but the *Canon Law*, was allow'd by the Prince to be taught in the University of *Paris*, from the Time of its Foundation.

Nay, the *Civil Law* had more Students than any other Science; for not only the *Laiety*, but abundance of *Churchmen* follow'd it with great Application: The Truth is, most of the Ecclesiasticks and Religious Persons, left the Study of *Divinity* and the *Canon Law*, to follow either the *Civil Law* or *Physick*; under pretence of qualifying themselves to manage the Affairs of their respective Societies, or the better to help and administer to the Sick; but they were often reproach'd with Insincerity, and told that it was a Worldly View or Self-Interest, or a vain Affectation of Reputation, that made them so diligent in the Study of prophane Sciences.

To put a Stop to this Irregularity, which daily increas'd, the Council of *Tours*, where *Alexander III.* presided, in the Year 1163. made an Order, That no profess'd Religious Person, should leave the Convent he belong'd to, with a Design of Study-
ing either Law or Physick; which Decision of the Eighth
Canon

The Decretal Super-specula explain'd. 117

Canon of that Council, is reported under the Title *Ne Clerici vel Monachi secularibus negotiis se immisceant.*

After that, Pope *Honorius III.* thinking himself oblig'd to renew that Prohibition, in the Fourth Year of his *Papacy*, which was in 1219, made that famous *Decretal* beginning with these Words, *Super-specula.*

The Drift of this *Epistle*, was to encourage the *Regulars* and other Ecclesiastical Persons, to read the *Holy Scriptures*, being, as the same Pope often hints, the Study which best suited their Profession; but as it relates to Three Points, which are divided into so many different Titles, in the *Decretal* of *Gregory IX.* the Sence of its Author has been in some measure misapply'd.

The first *Article*, which is in the last Chapter of the *Decretal Titulo ne Clerici vel Monachi secularibus negot. se immisceant*, orders, in explaining the Council of *Tours*, That the *Bishops* should declare such Religious Persons as study'd *Law* and *Physick* in their respective Diocesses, to stand *Excommunicated*; and it extends the *Penalties* appointed by the Council of *Tours*, to *Arch-Deacons*, *Deans*, *Curates*, *Provosts*, *Chanters*, and other *Clerks* belonging to any *Chapter*, and even to *Priests*.

In the Second Part, which is reported in the last Chapter of the *Decretal Titulo de Magistris*, *Honorius* orders, That in pursuance of the *Decree* of the General Council, that is, the Fourth *Lateran Council*, there should be in every *Metropolitan Church* a *Professor of Divinity*, with a Salary equal to a *Prebend*, to instruct the Poor *Clerks* in that Science.

And to the End that such Ecclesiasticks might not be taken off from that Study, by following the *Secular Laws*, the Third Part of the *Epistle*, which is the famous Chapter *Super-specula* 28. *Extra de Privilegiis*, prohibits the Study of the *Laws* in the City of *Paris*, and adjacent Places.

If this *Epistle* had been preserv'd in it natural order, in the *Decretals* of *Gregory IX.* the Author's Intention by this last *Article*, had been easily understood, by the Coherence thereof with the preceding Parts; which is calculated only to regulate the Study of *Churchmen*.

But the Compiler, having divided this *Constitution* into several *Articles*, according to the different Matters to which, in his Judgment, they relate, it has happen'd that the latter Part, which in reality respects *Ecclesiastical Persons* only, being

118 *The Decretal Super-Specula explain'd.*

being separately taken, passes upon the World for a general Prohibition, including all Ranks of Men.

For how is it possible, if it be consider'd as belonging to the First Part of the *Decretal*, not to perceive it no otherwise regards the *Civil Law*, than by extending the Prohibitions of the Council of *Tours*, which reach only the *Religious*, to all *Ecclesiasticks* in general, from applying themselves to this Study, to the neglect of those Sciences which seem to be their proper Business: And the Reason why those of *Paris* are mention'd, is only because the Sciences flourish'd most there at that Time.

Besides, the Reason of this *Decretal's* mentioning the University of *Paris*, was, because it was then the only one in *France*; for that at *Tholouse*, which comes next to it in Antiquity, was not founded till 1230; Eleven Years after the Promulgation of this *Constitution*; and all the rest since the Year 1300.

We have, besides, substantial Proofs to shew, that this *Decretal*, in the Article *Super-Specula*, was only intended against Ecclesiastical Persons.

For, the Pope, having no *Temporal Jurisdiction* within another Prince's Dominions, how could his Prohibitions to read or study the *Civil Law*, extend to any other than *Ecclesiasticks*. The Distinction which the *Law of God* makes between the *Temporal* and *Spiritual* Power, shews evidently, that such a Prohibition would have been an open Invasion of the *Royal Authority*.

Besides, how could such a *Decree* be register'd in the Reign of a Prince so powerful and tender in those Matters as *Philip the August*: Every Body knows, that all *Bulls* and *Constitutions* from the *Holy See*, even those that relate to *Ecclesiastical Matters*, as well as the *Regulations* of *General Councils*, are of no force in this Kingdom till they have been duly confirm'd in Parliament, in pursuance of his Majesty's *Letters Patents*.

But to remove this Difficulty, 'tis pretended, that Pope *Honorius* had not made this Prohibition, but at the Request of *Philip the August*, so far as the *Sovereignty* of the Kings of *France* seem'd to be diminish'd, by Reading the *Civil Law* in the University of *Paris*,

To this it is answer'd, if the King had been of that Opinion, he needed not the Pope's Assistance, to make such a Prohibition, which was absolutely in his own Power.

Besides, is it likely the Pope would excommunicate all the Laity, for Disobedience in a Matter that is neither of a *Spiritual* or *Criminal* Nature ; especially since that Punishment is reserv'd for the most heinous Crimes ?

The Pope therefore, could not give this Prohibition in *Paris*, for any other than the Religious and Ecclesiastical Persons, whose Duty it is, to make the *Holy Scriptures* and the *Canon Law* their principal Study, in order to acquit themselves worthily in their respective Stations.

As the Matter in Question was of great Importance, being to recal them to the Study of *Divinity* and of the *Canons*, which they had forsaken for *Physick* or the *Civil Law* ; it was necessary for that End to make use of all the Severity of Ecclesiastical Penalties : But since the *Churchmen* betook themselves of their own accord, to the Study of those Sciences which ought to have the Preference with Them, our Divines have been so far from discouraging them to Study the *Civil Law*, that they have exhorted them to it, as a part of Learning which might not only be of great use to them, in examining Cases of *Conscience*, but also in understanding many of the *Canons*.

We need only read the Inscription of the *Decree Super-specula*, and join its Conclusion to the Beginning, to be convinc'd, that the Pope never intended his Prohibition should extend to the Laity. It cannot be deny'd, that the Pope's *Epistles*, as well as *Letters* and *Rescripts* of Princes, which are issu'd for the Explanation or Establishing any thing, are generally directed to those who are to look after the Execution, or are otherwise concern'd : From whence it follows, that if it had been the Pope's Intentions to oblige all Orders of Men by this *Decree* to abstain from reading the *Civil Law* at *Paris*, He would have directed it either to the King or the *Magistracy*, who could have inforc'd the Execution of it among the *Laity* ; or else to the *Regent Doctors* who might have done it in their *Schools* ; yet it is address'd to the *Chapter* of the Church of *Paris*, and other Prelates dwelling there, as *Concius*, *Ciranius*, and the *Roman Correctors* report.

120 *The Decretal Super-specula explain d.*

This Direction is to those only, who had Jurisdiction over the *Priests* and *Monks*; and were themselves under an Obligation of observing the Prohibition, as well as making others do it; for the Word *Prelate* here, signifies not only *Bishops*, but *regular Abbats, Deans, Provosts*, and all others who had *Spiritual Jurisdiction*.

Nor is it less manifest, from the Body of this *Epistle*, that this *Decree* relates only to *Religious Persons* and *Priests*, if it be laid altogether, and the latter compar'd with the former Parts; which is a Rule the *Lawyers* prescribe for interpreting all *Laws*: In short, to understand the true Meaning of it, it must not be taken by Scraps and Pieces, but consider'd intire, and in the Literal Coherence one Part has with the other; by which means, it will soon be discover'd, that the *Decree* relates only to Ecclesiastical Persons, and that the latter Part thereof cannot be extended to the Laity.

The Motive also of the other *Constitution*, is another Argument to shew, that the Design of it was to regulate the Study of the *Ecclesiasticks*; the Pope alledging no other Reason for his making it, than to encourage the Study of the *Holy Scriptures*.

Now, methinks, it cannot be pretended that his Intention was to make the *Scriptures* the only Object of the Study of the Laity of *Paris*.

'Tis objected, that the Terms of this *Constitution* are General, and enjoin *Ne quisquam*, That no Person whatsoever should presume to Teach or hear the *Civil Law* read at *Paris*. To this it is answer'd, that *Verba intelligenda, sunt pro subiecta materia*; Thus the Terms, *Nullus, Quisquam, Omnis*, &c. tho' they seem General, and to comprehend all kind of Persons and Places, are nevertheless to be understood conditionally, and with such Restrictions as Reason and Circumstances require: This is a Rule which the *Laws* themselves teach. Now amongst these Conditions, the most necessary, is, that those who are comprehended in any *Law* or *Ordinance*, should be subject to the Jurisdiction of him that makes it; and in that Point which the *Constitution* goes upon: For no Man is oblig'd to obey another, who commands a thing out of his own *Discretion*, or for which he has no competent Power. From whence it follows, that when the Pope said *Ne quisquam presumat*, His Intention by those General Terms, was only to bind all Ecclesiastical Persons

Persons mention'd in the former Part of his *Epistle*, and over whom only he could exercise his Authority in that Particular.

Let us now see if this *Decree* was ever observ'd in respect of the Laity, and whether the Prohibition it contains of teaching the *Civil Law* publicly at *Paris*, was put in Execution; for every one knows that the Pope's *Decrees* have not the Force of *Laws* amongst us, till they are authoriz'd by *Usage*, having first been duly accepted and register'd.

Rigord, who was a Coremporary Author, and out-liv'd *Philip the August*, proves, that in his Time the *Civil Law* was not only allow'd by the King to be taught at *Paris*, as well as other Sciences, but with extraordinary Privileges.

We find in History, that the *Doctors* and *Scholars* of the University of *Paris*, having had some Disgust given them by the *Townsmen* infringing their Privileges, in the Beginning of the Reign of *St. Lewis*, dispers'd themselves into several Places both in *France* and the neighbouring Countries. Pope *Gregory* the Ninth, who thought it necessary to preserve the University of *Paris*, contriv'd, in Conjunction with *St. Lewis*, to induce the greatest part of those *Doctors* to return to *Paris*, in the Year 1231; and amongst the rest, the Professors of the *Civil Law*. [*Videndus Navigius Bern. Guido. in Chro. Rom. Pontif. & Gregorium IX. in Epist. ad Raynaldum in Annal. Eccles. ad ann. 1228, & 1231.*]

Several Authors make mention of an Oath of Fidelity taken to Queen *Blanche*, Mother of *St. Lewis*, as Regent, by the University of *Paris*; and particularly, by the *Doctors* of Law, and *Bachelors*, who under them read the *Decretals* or the *Civil Law*: This was in the Year 1251, and consequently, Thirty two Years after the Publication of Pope *Gregory's* *Decretals*, and so after his Death.

The *Statutes* of the *Faculties* of Law at *Paris*, prove also, that the *Decretal Super-specula* did not all interrupt the Study of the *Civil Law* in that Faculty; they were made in the Year 1296, which was the Eleventh of *Philip the Handsome*, and renew'd upon reforming that University, a long time after.

It appears by these new *Statutes*, there were at that time *Bachelors* in the *Civil* as well as the *Canon Law*, and they prescribe the same Rules for both.

The ancient Registers of the *Deanaries* of the same Faculty, take

take notice of the Names of those who were *Graduates in Jure Canonico tantum, vel in Legibus tantum, seu in Jure Civili, aut in utroque Jure*. Several old *Acquittances* of the Monks of *St. John de Lateran* shew, that they receiv'd from the *Faculty* the *Annual Stipend* allow'd them for saying Mass in their Church.

All our Registers testify, that since the *Decretal Super-specula*, there have been continually Publick Lectures of *Civil and Canon Law* in our *Faculty*; and the Names of such as underwent those Laborious Functions being register'd, we may easily observe, the greatest part of them have been Persons remarkable for their Birth, Personal Merit, as well as great Offices to which they were advanc'd. The great Number of them will not allow me to give an Account of all; but some I shall take notice of.

In our first Register, amongst others, we find the Name of *Miles de Irlers*, who was *Counsellor* to the Parliament, *Arch-Deacon*, and at length, in 1459, made *Bishop of Chartres*; of *John Courcelles*, *Counsellor* to the Parliament, *Canon* and *Arch-Deacon* of *Josæ*, in the Church of *Paris*; of *Martin de Fresnes* also, *Counsellor* in the Parliament of *Paris*.

In the second Register, amongst others, we have the Names of *Amboise de Cambray*, Master of *Requests*, Son of *Adam de Cambray*, First-President, who was employ'd by *Lewis* the Eleventh in several Embassies; of *Nicholas de Cointy*, Precentor of *Amiens*; of *James Juvius*, *John du Plais*, *John Picard* and *Robert Luller*, all Four *Counsellors* in the Parliament of *Paris*; and of *John Seguyer*, who in the Year 1480, was made *Counsellor* of the Parliament of *Tholouse*. The same Register has also the Names of *Robert Gaguin*, afterwards First-President; of *Reguard de la Vaquerie*, also First-President; of *Claudius de Hangest*, *Counsellor* in the Parliament of *Paris*; and of *Nicholas d'Origny*, *Canon* of *Troyes*, and *President* of the Parliament.

In the third Register, among other *Regent-Doctors*, are *Martial Galiciere*, *Arch-Deacon* of *Meaux*, *Canon* of *Paris*, and *President* of the Parliament in 1525; *Peter Parpas*, *Counsellor*, afterwards *President* of the Great Council; *Philip le Boindre*, *Counsellor*; *Peter le Clerc*, *Embassador* of *Francis I.* at the Council of *Trent*: These last were Collegues with *John Rebuffe*, *John Quintin*, *John Vadel*, and for some time of *Anthony le Conte*, all famous Men in the Profession of the Law.

Besides

The Decretal Super-specula explain'd. 123

Besides these, there were several other *Regent-Doctors*, who were *Counsellors* in the Parliament, and whose Names are set down in the Register; as *Francis de Marillac*, *William de Boucherat*, *Charles le Fevre*, *Anthony le Clerc*, and many others.

We learn from the same Registers, that *M. Henry de Mesmes*, Deputy to one of the *Regent-Doctors*, read Lectures in the Schools upon *Justinian's Institutes*, in the Year 1551; and that in the Year 1556, *M. John Chevalier*, who was afterwards First-President of the Court of *Aids*, read Lectures there publickly, upon the Title *De Actionibus*; having first disputed, in order to be made Deputy to *M. Peter le Clerc*, *Regent-Doctor*.

And if *Rome* and *Constantinople* have *Lawyers*, whose Professions were adorn'd with the most Eminent Offices of the Empire, such as *Consul*, *Governor of the City*, *Master of the Household*, *Treasurer* or *Chancellor*; The *Faculty of Law* at *Paris*, can also among its Professors, boast of a great Number of Illustrious Persons; not only by their Science, but the most eminent Employments of the Long Robe, to which they have been advanc'd thro' their Merit, and fill'd the same with singular Capacity and Distinction. But, if on one hand the *Law* was honour'd by the Dignity of those *Magistrates* who taught it, on the other, the Splendor they added to the Profession, did them no less Honour; being an infallible Token of their Application, Merit, and Capacity.

We have many other Proofs, that notwithstanding the *Decree Super-specula*, the *Civil Law* has been always publickly taught in the *Faculty of Paris*.

Bouchel, in his Book call'd *The French Law-Library*, under the Word *University*, mentions an Order or Letter, written by the Rector of the University of *Paris*, *Novemb. 22. 1410*. Directed and Signify'd to the *Regents* and *Deputies* of the University; in which the Names of all the *Licentiates*, either in the *Canon* or *Civil Law* are expressly set down.

In the third Register of the *Faculty*, there are Two Orders of the Court, one dated the First of *July*, 1542, the other the First of *September*, 1547. to forbid the Printing of any Books in *Paris* without Licence; in which, the Right of Licensing and Approving *Civil* and *Canon Law-Books*, is granted to the *Dean* of the *Faculty of Law*, as that of *Divinity* and *Physick*, was given to the Professors of those Sciences;

ences; and that of *Grammar*, to the *Rector*; which has been since put in Execution, and renew'd on several Occasions. Now if the *Civil Law* had not been publickly taught in the Schools at *Paris*, could such a Knowledge of the *Civil Law*, as was necessary to pass a true Judgment upon the Books that treat of that Subject, have been reasonably requir'd?

All that has been before said, makes it fully appear, that till the Publishing the *Ordinance of Blois*, the *Civil Law* was ever taught in the *Faculty of Paris*; and therefore, it will be needless to add any other Proofs: It may not be amiss, however, to consult the Note made by *M. Charles Du Moulin*, upon the *Article 273*, of the *Ancient Custom of Orleans*; *Rebuffe*, in *tractatu Nominat. Quest. 5. Num. 15. & seq.* *Pa-squier*, in his *Recherches*, Book 9. Chap. 35. and 37. and *M. Caseneuve*, in his *Treatise of Frankaloid*, Book 1. Chap. 5.

As to what remains, it will be no difficult Matter to prove, notwithstanding the *Ordinance of Blois*, the *Civil Law* has been continually read at *Paris*; which shall be the Subject of the following Chapter.

C H A P. XXVIII.

The Sixty ninth Article of the Ordonnance of Blois explain'd.

THE *Ordonnance of Blois*, publish'd in *May*, 1579, was drawn up by the *Journal of the States*, two Years before: In the Minutes by which that *Ordonnance* was form'd, there was no mention of prohibiting the Study of the *Civil Law* in the *Faculty of Paris*; yet, the Enemies of the *Faculty*, have had the Dexterity to get the Sixty ninth Article inserted, which forbids the *Regent-Doctors* of the *Faculty of Law* at *Paris*, to read, or confer Degrees in the *Civil Law*.

Let us briefly examine the Manner and Reasons upon which that Prohibition was grounded, and then see if the *Ordonnance of Blois* has been put in Execution in that particular.

I have just now said, there was no such thing mention'd in the *Minutes* from which that *Ordonnance* was taken ; but there is something more in it ; for that Prohibition was made without any Examination or Cognizance of the Cause, and even without hearing the Parties concern'd.

This Article which was not touch'd upon in the *Assembly* of the *States*, was afterwards added to the *Ordonnance* by the Chancellor *Chiverny*, to favour the City of *Orleans*, where he was *Governor* and had a great Estate ; this is a Fact related by several Authors, and not at all unlikely.

The Pretence for making this *Ordonnance*, was the *Decretal* of *Honorius* before spoken of, to which it was hinted, Obedience ought to be paid.

And to give this Article the Colour of a *Reason of State*, it was laid down for a Principle, that it was the King's Interest to forbid the teaching of the *Roman Laws*, in his Capital City of *Paris* ; because it tacitly infer'd the Empire's Superiority over the Kingdom of *France* ; which is absolutely independant of any other : Their Argument run thus, " The *Civil Law* is the Work of the *Roman Emperors*, therefore, it cannot be admitted, without acknowledging in some measure, that the Crown of *France*, which the King holds of God only, and his Sword, is a Dependant of the Empire, as a Superior Power.

If the Parties concern'd had been call'd upon, this Objection would have been easily remov'd, by a very plain and natural Answer, which is, that the allowing the *Civil Law* to be read at *Paris*, derogates no more from the King's Sovereignty, than the Permission of reading it in any other Place of the Kingdom.

And indeed, what appearance is there, that the Sovereignty of a Prince should be in the least diminish'd, by adopting the *Laws* of another Sovereign Prince, or giving his Subjects leave to follow and make use of those *Laws* ?

Our Kings, by approving the *Roman Laws*, have made them their own, as the *Romans* did the *Laws* of *Rhodes*, in Maritime Affairs ; and can it be said, that the *Roman Emperors* submitted to that Island, because they adopted some of their *Laws* ?

The Book of *Fiefs*, which is generally thought to be the Composition of some *Lombard Doctors*, pass nevertheless for *Law* all over *Europe*, when *Custom* is not contrary to it, yet no one ever concluded from thence, that all *Christendom* was subject to the Princes of *Lombardy*.

'Tis well known, the Kings of *Poland* and *Denmark*, suffer their Subjects to make use of the *Roman Laws*, and that they are oblig'd to follow them, when their own *Municipal Laws* are defective; the same are also taught in their Universities of *Cracow* and *Copenhagen*, yet they were never under any Apprehension, that this Permission would blemish their Sovereignty in the least Degree.

Has the *Turkish* Emperor diminish'd his, by submitting to the Decision of the *Roman Laws*, when the *Alcoran* is silent! And do so many other Princes, who were never subject to the *Romans*, or withdrew themselves from their Obedience, all become Dependants of *Rome*, by observing the *Laws* made there? No certainly; the voluntary Deference which they shew them, is not an Effect of their Dependance, but of their Reason, which leads them to make choice of such *Laws*, as they could not reject, without straying at the same time from Equity and Right Reason: And the Truth is, the *Roman Law* is now, not the *Law* of any particular People, but a General and Common *Law*, which, from the Destruction of the *Roman Empire*, has ever been regarded by all well-govern'd Nations, as a *Natural Law*, and a *Law of Nations*, which consequently ought to be universal.

These are the Reasons, why after the Destruction of the *Roman Empire*, their *Laws*, instead of losing their Authority, spread themselves all over *Europe*, and most Nations were proud of following them.

The King of *France* therefore, who is a Monarch in his own Kingdom, and invested with all Imperial Privileges, does in no measure submit to the Empire, by suffering the *Civil Law* to be taught, and his Subjects to make use of it: There is only one Observation to be made on this particular, which is, that in *France* the Nullities of the *Civil Law* are not allow'd; that is, when the *Roman Law* annuls a *Contract*, by any Remedy or Benefit introduc'd by the Equity thereof, the Judges cannot pronounce Sentence upon that Nullity, unless the Party has first obtain'd *Letters* from

from the Prince for that Purpose, in token of not acknowledging the *Roman* Emperor's Authority ; whereas they may pronounce definitively without such *Letters*, when the Nullity proceeds from the *Ordonnances* or *Customs* : So that when we say, the ways of Nullity are not admitted in *France*, it is for the Reason aforesaid, to be understood only of such as have their Foundation in the *Civil Law*.

But it may be said, the *Civil Law* is not receiv'd as *Law* all over *France* ; 'tis true, yet this is no Reason why it should not be taught there : Do those Nations of *Europe*, which follow it only when their own *Laws* are defective, suffer any other *Law* to be taught in their Universities ? And is it not a Rule among many of them, not to admit any one to be a *Judge* or *Advocate*, before he is a *Doctor* or *Licentiate* in the *Civil Law* ? So true it is, that this *Law* is every where look'd upon as the perfect Model of all good *Laws*, and Source of all good Principles.

Besides, the *Decretals* are not admitted as *Laws* amongst us, till Custom has given them that Authority ; and when they are not repugnant to the Liberties of the *Gallican* Church, nor to our particular *Customs* ; yet, there is no University in the Kingdom, wherein there are not Publick Lectures upon them.

Thus, as the Prohibition of reading the *Civil Law* publickly at *Paris*, contain'd in the *Ordonnance* of *Blois*, is against all Rule, 'tis no wonder if it never was obey'd ; nor has it hinder'd the *Regent-Doctors* of the *Faculty*, to continue their Explanations of the *Institutes*, and other parts of that *Law* ; and to admit the *Licentiates* of the *Faculty* of *Paris*, to be *Judges* and *Advocates*, as they were before the *Ordonnance* of *Blois* came out.

The truth of this is sufficiently made out, not only by the Historians of that time, but by the *Statutes* of the *Faculty*, which were reform'd by *Commissaries* appointed by *Henry IV.* in 1598, and ratify'd in Parliament the Year following.

These *Statutes* begin with an *Encomium* of the *Faculty*, which is called, The Seminary of Persons design'd to fill the most eminent Employments both in Church and State ; the Words are these, *Juris Canonici schola adhuc usque tempora seminarium honestissimorum hominum, ad Ecclesiasticos gradus & Reipublicæ munia, tam Ecclesiastica quam secularia promovendum exstitit, &c.*

The Fifth Article of these *Statutes* provides, That all new Scholars in the *Faculty*, shall begin their Studies of the *Civil* and *Canon Law*, by reading the *Institutes*; and learn by heart the *Rubrics* of both *Laws*. *Prolyta, à lectione & auditione Institutionum & Canonici & Civilis Juris studium exordiantur ac sedulam operam in eo collocet, ut utriusque Juris titulos memoriter teneat.*

Another Argument, and a very good one, might be added to all these Proofs, which is, that the *Faculty's* Power of teaching the *Civil Law* at *Paris*, has never been call'd in question; from whence it follows, that it ought never to have been depriv'd of that Power: For whoever has the least Tincture of the *Canon Law*, will easily judge of the Impossibility of understanding it rightly, without the Assistance of the *Civil Law*. Indeed, as they are the two Eyes of Politick and Judiciary Prudence, the Strength of both ought to be united, to see things in their true Light; and in a Word, ought both to operate at the same Time.

In what manner soever we consider the Prohibition in the *Ordonnance* of *Blois*, against teaching the *Civil Law* in *Paris*, 'tis plain, the Execution of it is Impracticable: Every one knows, the University of *Paris* is the First in the Kingdom; our Princes have honour'd it with the Title of their *Eldest Daughter*, as having had its Birth in the Royal Palace: Besides, it claims a Place in the *States*, has sent Deputies to *General Councils*, been frequently consulted by our *Kings*, and often by the *Popes*; and Foreign Nations have chang'd the Advice they have had from thence into *Laws*; so that one may say, it is not confin'd to the Circle of *Paris*, but according to its Motto, is, *HIC ET UBIQUE TERRARUM*: From whence it follows, that it is so far from being inferior to other Universities, it ought to have some Prerogatives, and serve as a Pattern for their Imitation.

This being laid down for a Certainty, as it really is, would it have been fit that this University should be defective, and want one of its most Noble Parts, the *Civil Law*? How could it without that, have maintain'd either the Dignity or even the Name of an University, which is nothing else but a Collection of all the Sciences?

In short, the City of *Paris* being the Common Countrey of all *Frenchmen*, the largest and most beautiful Theatre of *Europe*, it was necessary that all kinds of useful Learning should be taught there, for the Advantage of our own Countreymen, as well as Strangers, who continually flock thither.

Now it cannot be deny'd, that there is no Study comparable to that of the *Civil Law*, and that the Science thereof is far above all others, as shall be shewn in the following Chapter ; but here we must first remark, that *Lewis XIV.* being inform'd of the Inconveniencies, which might arise from the *Ordonnance of Blois*, made an *Edict* in *April, 1679.* by which he orders, that for the future, the Publick Lectures of the *Civil Law*, jointly with those of the *Canon Law*, should be reviv'd and establish'd in the University of *Paris*.

This *Edict* prescribes the Time which all Students are to employ in that Science, before they are made *Graduates*; with many other things relating to the Discipline of the Scholars, which till then had been mightily neglected, by all the *Faculties of Law* in the Kingdom.

There was an absolute Necessity of applying some Remedy to this last Abuse ; and the rest of the Universities observing no Rules, and conferring Degrees on every one that ask'd, without examining whether they were qualify'd or not, it became the King's Wisdom, to put a Stop to the Disorder which this Irregularity had introduc'd.

Nor was the re-establishing of the *Civil Law* in the *Faculty* of *Paris*, less necessary for the Preservation of good Order ; for the Enemies of the *Faculty* complain'd continually, that the *Civil Law* was taught, in breach of the Prohibition contain'd in the Sixty ninth Article of the *Ordonnance of Blois*; so that the Royal Authority was oblig'd to interfere, to support the *Faculty* in a Right that had ever belong'd to them.

C H A P. XXXIX.

Of the Excellency of the Roman Law.

IF there have been some that have dispured the Excellency of the *Roman Law*, the absurdity of so extravagant an Opinion, may very well save me the Trouble of refuting it: For tho' particular Mistakes often become general, there is no likelihood it will happen so in this Case; and the Merits of the *Roman Law* are establish'd upon too good a Bottom to give way to a Prejudice, which in all likelhood proceeds from the Ignorance of those who suffer themselves to be led away by such an Error.

Nevertheless, it cannot be deny'd, but the Number of Persons who favour this Opinion, may very much increase, because it offers at first sight an agreeable Prospect, in sparing such as embrace it a laborious Study. This, doubtless, is the only Advantage that can result from it: But it will be no hard Matter to expose the Pallacy of this pretended Advantage, and undeceive those, who having compleated the Time prescrib'd for their ordinary Exercises, content themselves with taking their Degrees, and look no farther than to get the *Testimonials* usually given on that Occasion.

The Time allotted for studying the *Law*, by the King's Declaration, to intitle Students to take their Degrees, is not sufficient to acquire a compleat Knowledge of so profound a Science.

It would therefore become those who have taken their Degrees, to make a better use than some do of the Principles they are taught; for the Publick are sensibly interested, that all who are *Magistrates*, or take upon them the Profession of *Advocates*, should be fully instructed in the Maxims of the *Roman Law*, without the Help of which, it will be impossible for them to become eminent in *ours*.

What is before said in the Twenty sixth Chapter, concerning the Use of the *Roman Law* in *France*, has a very near Relation to the Subject of this Chapter; therefore I shall refer

Of the Excellency of the Roman Law. 131

refer the Reader to it. Let us now see what new Evidence we can bring of the Excellency of the *Roman Law*.

As there is no better Proof of the Excellency of any Science, than Reason, and the unanimous Opinion of Persons who acknowledge it; that of the *Roman Law*, may be fully justify'd by Two Observations: The First is, that Reason alone ought to convince us thereof; the Second, that the Excellency of the *Roman Law*, has ever been acknowledg'd by the Great Men of all Ages, whose Authority alone, sufficiently speaks its Praise: These Two Points I shall examine in a few Words.

Natural Reason having implanted in the Heart of Man, those Principles which govern him, both as a Private Person, and as a Member of the Society to which he belongs, nothing ought to be more sacredly observ'd by him; and methinks, he should want no other *Law* to engage him to follow them: But as all Men are not so prone as they ought to be, to follow the Dictates of *Natural Reason*, there was a Necessity of making *Laws* to keep them to their Duty.

Thus, after they were oblig'd by Necessity to relinquish their first Habitations, and were dispers'd into different Countries, and had built Cities and establish'd Kingdoms, every Nation apply'd the Precepts of the *Law of Nations* to their own Use and particular Benefit; and so making some Additions to the Common *Law* of Mankind, or retrenching it, according to their different Genius, and the Necessities of the Countrey they liv'd in, they made *Laws*, and establish'd a *Right* peculiar to themselves.

Asia had the Advantage of being reckon'd to have the Wisest and most Equitable *Laws*. This was a Truth so generally receiv'd, that the *Romans* notwithstanding their Haughtiness, fetch'd the most valuable Part of their *Laws* from thence; and made use of it in the Composition of a Body of Universal *Laws*; I mean, those of the *Twelve Tables*, which were afterwards look'd upon as the Source of all *Laws*, both Publick and Private; and which infinitely surpass'd all that the Sages of *Asia* had made before.

All these Precautions taken by the *Romans* to make a perfect *Law*, and the infinite Pains which their greatest Men were at, to give Just Interpretations to that *Law*, are uncontestable Proofs of the Excellency of the *Roman Law*; nay, even the Emperors had this always in view, and encourag'd

132 *Of the Excellency of the Roman Law.*

their *Lawyers* to give a new Splendor to the *Roman Laws*; by their Labour and Application.

So that *Rome* was the Countrey of *Laws*; and the Body of the *Roman Law*, as we have it at this Day, is a Collection of the best *Laws* that were made in *Rome*: This valuable Treasure of Antiquity, contains the refin'd Doctrine of the Precepts of the *Law of Nature* and *Nations*, as well as all the principal Points of Morality; wherein alone the Principles of Equity, and Rules of Universal *Law* are to be found; and no doubt, if all this Nation were so happy as to live under the same *Law*, there would be no need of any other for the Regulation of the Condition and Manners of all its Subjects; and indeed, where else shall we find certain Maxims for the Regulations of *Agreements* and *Contracts*, for establishing *Penalties* upon those that are guilty of *Crimes* and *Offences*? In short, where shall we find Principles to govern the most Ordinary, as well as the most Important Affairs, but in the Body of the *Civil Law*, whose *Decisions* are so Equitable and Judicious, that they may be apply'd to Matters quite different from those for which they were originally made?

The Science of the *Roman Law*, has not only the Advantage of informing the Understanding, but setting the Heart upright; it communicates at the same time Light to the Mind, and Righteousness to the Soul, and teaches us how to conduct our selves as well in a Private as Publick Capacity; and furnishes the *Magistrate* with Rules to give every Man his due: In a Word, the *Roman Law* is a Master-piece of Wisdom, Honesty, Politicks, Prudence, Justice and Equity.

It was called *The Law*, by way of Excellence, as if there was none other Considerable in the World; and altho' the *Roman Power* has been quite lost for many Ages, the *Roman Law* is still preserv'd over all *Europe*. But it is no wonder if its Excellency has been perceiv'd by all People, and at all Times; and tho' it was made for the Subjects of the Empire only, there are few Nations that have not adopted it; and even those whose Inclinations and Manners were the most opposite to the *Romans*, were the first that embrac'd the *Laws* made by them.

Let it not therefore be said, this was an Effect of the Universal Monarchy acquir'd by the *Romans*: The great Equity which all Nations observ'd in the *Roman Laws*, was the only Cause of the Deference paid to them, and of their readiness to follow them; *Servatur ubique jus Romanum non ratione imperii sed rationis imperio*. In short, most of the Nations conquer'd by the *Romans*, admir'd and cultivated the Equity of their *Laws*; altho' their Tyranny seem'd insupportable: And when, upon the Declension of the *Roman Empire*, they recover'd their Liberty, that Revolution did not at all diminish the Respect they bore to the *Roman Laws*.

I cannot in this Place, pass over an Observation which presents it self; Whatever Glory *Rome* might have acquir'd, by the Number and Extent of its Conquests, that which gave it the greatest Lustre, was, without doubt, its being acknowledg'd by all the World to be the *Mother of the Laws*. The subduing the greatest Part of the Universe, must be allow'd to be owing, either to their great Strength or masterly Skill, or to particular good Fortune; of all which there are some other Examples: But the Credit of making such *Wise Laws*, so generally receiv'd by all Nations, is peculiar, and what the *Romans* only can boast of.

Besides, how much has the Esteem of the *Roman Laws* surviv'd the Empire? All those Nations who had freed themselves from the *Roman Bondage*, continu'd voluntarily in that of their *Laws*, which they preferr'd to those of their own Countries. Can this Concurrence be the Effect of Flattery, that Power which was the Object of it subsisting no longer?

The *Romans* equally subdu'd the Universe, by their *Arms* and *Laws*; but that Empire which was gotten by Force, is gone to ruin; whereas, they still continue to govern by their *Laws*: This Dominion is so much the more glorious, as it is not owing to Force, and is over the Minds and Hearts of Mankind; and as 'tis founded upon Reason and Equity, nothing can destroy it. The *Wars* of the *Romans* were often unjust; but their *Laws* seem to have been dictated by *Justice* her self: Therefore, they ought never to cease being observ'd by Mankind, unless they will utterly banish from Society, that Vertue which is the strongest Support of it.

134 *Of the Excellency of the Roman Law.*

To this, let us add, that the invincible Stubbornness of the *Jews*, has yielded to the Excellency of the *Roman Laws*; who have recourse to no other, in default of their own: And as great as the Antipathy of the *Turks* is, to every thing that is of Christian growth, yet it has not hinder'd them from translating the *Roman Law* into their own Language, nor from following its Decisions, in Matters to which the *Alcoran* cannot be apply'd.

Nothing could be easier, than to add a Thousand other Observations of this kind, to shew the Excellency of the *Roman Laws*; but Truth has the Prerogative of Self-Perswasion. Besides, all that I could say, would not be Equivalent to the Encomiums which the Great Men of all Ages have ever given the *Roman Law*. Let us therefore hear what they say, and run over the most Famous of them who have mention'd it; upon whose Credit, every Man of Sense will without Scruple ground his Judgment.

St. *Austin*, * in his Book *De Civitat. Dei*, says, that Providence made use of the *Roman People*, to subdue the Universe, and to govern it the better by their *Laws*, after it had utterly destroy'd that Empire.

St. *Jerom*, † speaking of the Declension of the *Roman Empire*, says, “The Ruins and Shadow thereof, were yet to be seen in *Germany*; but tho' nothing at all of it had remain'd, we have still their *Laws*, which all Nations have admitted with great Applause.

Zonaras, upon the *Constitutions of the Apostles* ‡, says, “God made Choice of the *Romans*, to give the World a sample of his Justice.

Peter Pech || says, “The *Roman* is the Sovereign *Law*, universally receiv'd for so many Ages.

D. *Gothofredus*, ** says almost the same, and adds, “That the *Laws* and *Regulations* of other Nations do not come near it; and that all their *Customs* and *Ordonnances* are comprehended in it.

* Chapter 22. Book 18.

† Epist. 10. of *Manegamy*, Tom. 1.

‡ Book 7. Chap. 27.

§ *De Regulis Juris*, Chap. 28.

|| *In Praxi Jurum Civil.*, Lib. 2. Tit. 1.

Of the Excellency of the Roman Law. 135

Baldus, upon the *Law*, *Nemo C de sentent. & interlocut. omnium Judicium*, says, "The Roman Law has the same command in all Nations as Reason.

Contius, *Lectio num Juris*, cap. 9. says, "There is no Law more just or conformable to Reason, than that which is contain'd in the Books of the Roman Law.

Baro, *lib. 3. de jur. Benef. tit. 2. § ad legem si reus C. de pactis*, says, "That *Justinian's* Books are valu'd like fine Pictures sav'd from a great Shipwreck.

Baldwinus, in his *Prolegomena* upon the *Institutes*, says, "The Study of the Law was ever in great repute among the Romans, and spread it self afterwards over all Nations, with universal Approbation.

Charles Du Moulin, whose great Reputation was wholly owing to his adding a perfect Knowledge of the Roman Law to that of our *Ordonnances*, says, in his *Preface* to the *Custom of Paris*, that the Roman Law is so just, and so agreeable with Reason, that all Christendom has receiv'd and approv'd of it, as the Common Law of Nations: His Words are these, *Mutemur à jure Romano quod & equitati consonum, & negotio de quo agitur congruumque invenitur, non quod nusquam subditi fuerimus Justiniano magno, aut successoribus ejus, sed quia, jus illo autore à sapientissimis viris ordinatum tam æquum est, tam rationabile, ut omnium fere Christianarum gentium usu & approbatione, commune sit effectum.*

Cujacius, in his *Epistle* to his Son, tells him, "No Nation can be well govern'd, without the Help of the Roman Law; and adds, that "without the Knowledge of that Divine Science, the most Prudent, Wise, and Fortunate Man, will have but a very imperfect Idea of the Rules of Equity and true Justice.

Mornac, upon the Title of the Code, *De veteri Jure civili*, says, "That in Matters not determin'd by the Customs, recourse must be had to the Roman Law, as to a Sheet Anchor, and the most secure Means to come to Equity; because the Precepts and Duties of Civil Life, are no where else so well establish'd.

Leupius, in his *History of the Law*, says, "The Books of the Roman Law, contain the most Religious and Just Determinations that ever were made, as well as the most perfect Idea of Right and Justice: Therefore, says he, "all Nations acknowledge the Roman Law for their Com-

136 Of the Excellency of the Roman Law.

" *mon Law* ; not because it is *Roman*, but that it is the
 " *Law of Nations*.

Albericus Gentilis, Book 1. *De Jure belli*, Chap. 5. carries
 it so far as to say, " All Sovereign Princes are oblig'd to
 " be govern'd by it, in the Disputes that happen between
 " them.

Coquille, in his *Questions*, Chap. 306. says, " The *Roman*
 " *Laws*, by the wise and politick Reasons, upon which they
 " are groundd, were receiv'd by us in aid of our Royal
 " *Constitutions*, and of our *Customs*, when they either are
 " deficient or want Explanation. He adds, That the great
 " Events of the Politick Government of *Rome*, shew, that
 " God endow'd that People with a singular clearness of
 " Judgment, and openness of Heart.

Charondas in his *Answers*, Book 3. upon the *Edit* of *Second-*
Marriages, and in his *Pandects*, Book 3. Chap. 9. says, " 'Tis
 " a general Custom amongst us, to observe the *Roman* as
 " the *Common Law* ; to which we have recourse in default
 " of the *Ordonnances* and *Customs* : Not that the *French* any
 " ways acknowledge the Emperor of *Rome*, but because the
 " *Laws* of no Nation or Government are more just, better
 " contriv'd, or more agreeable with Reason, than those in
 " the Body of the *Roman Law*.

Loyseau, in his *Treatise of Surrendry of Copy-hold Lands*,
 Book 2. Chap. 1. N. 17. *Rebuffe*, upon the Title *De Consue-*
tud. *Tiraqueau*, in the Preface to his *Treatise* called, *Le*
more saisi le vis. *Chassanée*, upon the Custom of *Burgundy* ;
Pontanus, upon that of *Blois* ; *Chopin*, upon that of *Paris*, in
 his Preface upon that of *Anjou*, and his *Treatise* of the *Do-*
maine ; *Ricard*, upon the Hundred and Sixty first Article of
 the Custom of *Senlis* ; all say almost the same thing.

M. Colombet, in his *Abridgment* of the *Roman Law*, Tit. 3.
 says, that " the Body of the *Roman Law*, is not the Work
 " of one Man, nor of a few Years, but of several Nations
 " and Ages ; brought to Perfection by long and labori-
 " ous Observation of Human Affairs, which Men of the
 " best Understanding in that flourishing Nation, fully in-
 " structed by the Exercise of inferior Offices, and from
 " thence rais'd to the highest Employments in the Empire,
 " have made ; and reduc'd to practise, by certain Principles and
 " General Maxims. He adds, that this Work was found to
 " be so excellent, that even after the Fall of the *Roman Em-*
 " pire,

"pire, it was embrac'd by the best govern'd Nations of
 "the World ; which still continue to make use of it in
 "deciding their Disputes, and cause it to be publickly
 "taught for that purpose.

M. Servin, in one of his *Pleas*, says, that " The Civil
 " Law of the Romans, surpasses in Natural Equity all other
 " Laws ; and that all of them have recourse thereto.

M. le Maître, so famous for his Eloquence and extraordinary Parts, in his *Twelfth Pleading*, calls the *Roman Law*,
 " The wonderful Collection of the Wisdom of so many
 " Wise Men, who did not confine themselves to particular
 " Usages, but to Justice in general ; and have establish'd
 " such Laws, as they thought most useful to Mankind ; and
 " who have written the Rules of Government for all Nations, as Solomon did those of Divine Wisdom.

It cannot be objected, that these Proofs are liable to any Exception, being for the most part taken from *French Lawyers*, who have studied our *Customs*, and could not forbear taking notice, how preferable the *Roman Laws* are to those of their own Countrey ; in which, they have shewn both their good Sense and Judgment.

The particular Veneration which most *Kings* in the World have had for the *Roman Law*, is not a slender Indication of its Excellency ; they have given it the Force of Law in their Dominions, and order'd it to be publickly taught ; which is a peculiar Privilege belonging to the Laws of *Justinian's* Collection : For hitherto, there has been no Attempt that we know of, to teach *Solon's Laws*, how much soever they are cry'd up, or any others, publickly in the Schools.

But to confine my self to *France* ; Our Kings have not only taken care it should be taught in those Provinces where 'tis in full force, but even in those govern'd by *Customs*, as appears by the *Ordonnance* of *Moulins*, made in *August* 1546 and 1566, Article 10 ; and that of *Blois*, in 1576, Article 108.

Our Kings have upon all Occasions commended it, and made many *Ordonnances*, to enforce its Observation in their Dominions.

Clotarius, in his *Ordonnance* of 560, commands, that all Matters relating to the *Romans*, that is, the *Gauls*, should be regulated according to the *Roman Law*.

As

138 *Of the Excellency of the Roman Law.*

As for the Second Race of our Kings, we have the *Constitution* of *Charles the Bald*, dated the 25th of *June*, 864. in which he declares, that neither he nor his Predecessors ever intended to order any thing in opposition to the *Roman Law*.

But as the Difficulty does not fall upon the Times of the Two first Races, let us pass to the Third.

I shall begin with *St. Lewis*, who, for his great Care to promote Religion and maintain Justice in all his Dominions, may be a Pattern for all our Kings. He order'd in his *Edicts*, that all Matters should be decided by the *Roman Laws*, which, by way of Excellence, he calls *The Law*.

Philip the Handsome, as well as *Francis I.* speaks of it in the same manner.

Henry IV. in his Declaration of 1607, made to empower *Mortgages* to enter into the Succession of old Creditors, without *Cession* or *Subrogation*; says in express Terms, *He always approv'd of the Roman Law, as it agreed with Reason and Equity.*

All our Kings have express'd themselves upon it almost in the same Terms; and 'tis from thence they have taken their best *Ordonnances*.

Lewis XIV. in his *Edict* of 1679, for re-establishing the Publick Profession of the *Civil Law* in the *Faculty of Paris*, begins by saying, "that altho' the Wars had not hinder'd him from publishing several *Ordonnances* for the Reformation of Justice, yet, enjoying at that time a glorious Peace, he was more disengag'd, and in a better Condition to provide for the due Execution of Justice, thro' all his Dominions." He goes on, and says, "that he believ'd he could do nothing that would more contribute to the Happiness of his Subjects, than the affording such as were design'd for the Administration of it, the Means of qualifying themselves as they ought: Therefore, having understood that the Uncertainty of Judgments, so prejudicial to his Subjects, was chiefly owing to the utter Neglect of the Study of the *Civil Law*, for above an Age, all over *France*; and that the Publick Profession thereof had been discontinu'd in the University of *Paris*; He orders, That from thenceforward, the Publick Lectures of the *Roman Law* should be reviv'd; any thing in the Sixty ninth Article

“ Article of the *Ordonnance* of *Blon* to the contrary notwithstanding.

To see to the Execution and Continuance of this *Edit*, his Majesty commission'd Four Counsellors of State, viz. Mr. *le Pellerier*, *Bazin de Bezons*, *Boucherat* and *Bignon*; whose Characters being capable of no Addition by any thing I can say, I have only mention'd their Names, to shew the Importance of the Affair, as well as to encrease, if possible, the Respect which Posterity ought to have for the Memory of such illustrious Restorers of the Study of the *Roman Law*; for one may say, all Discipline was at that time utterly lost, and there never was more Occasion for reviving it.

But these Commissioners, by their great Application, restor'd the Study of the *Civil Law*; and the Success which attended their Endeavours, is a further Proof of the Excellency thereof; and of the Necessity every one is under, to make himself Master of it; who intends to be an *Advocate*, or aims at the Office of a *Judge*.

From all I have said, it follows, that notwithstanding the the *Roman Law* is not of equal force in the *Customary Countries*, as in those of the *Written Law*, its Decisions are of great weight, in those Parts which are called *Customary* in *France*, since it is there receiv'd as *Written Reason*; to which every Judge ought to have recourse, in Cases omitted by the *Customs* of the Place: What is said upon this Subject in the Twenty Sixth Chapter, to which I refer the Reader, will save me the Trouble of enlarging further upon it in this Place.

I shall only observe, that if all our *Law* was confin'd to the *Ordonnances* and *Customs*, their would be very little Difference between the *Judges*, *Advocates*, and *Practitioners*; nay, sometimes, the latter would be more able than either of the others, for where the Learning of an *Advocate* goes no farther than *Tritura fori*, or *Practice*, 'tis impossible he should defend a Cause with Success; which made *John Favre* say, *Ad. 23. Instit. tit. de Legat. Quod appellamus praxim, non est in patrono nuda & circumforanea praxis, cujusmodi est procuratorum forensium, sed juris scientiam applicare negotiis.*

In short, Experience shews, that whatever good Dispositions young Men may have, it will be no easie Matter for them to learn the Sciences, unless they are directed by a Method, and general Principles; the future Application of which, depends upon their own good Understanding. Now it is in the *Roman Law* only, these Principles are to be found; which are so much the more valuable, as they are the Opinions of the wisest Men among the Ancients: Whereas the Decisions of our *Customs*, have no other Foundation than certain *Usages*, introduc'd frequently without any Reason or Principle at all, or of which the Reason is unknown, even to those, who by good Observation are the best Judges of what is the Common *Usage*.

This made *Cujacius* say, Tit. 14. of his Book of *Fiefs*, That we must judge of most Things ordain'd by the *Customs*, as *Neratius* did of the *Law* introduc'd by *Usage*; who advises, not to look too diligently after the Reason of it, lest we subvert the Authority of the whole. The Words of *Cujacius* are these; *Multa sunt in moribus Gallia, dissensanea multa sine ratione, ut quod de jure recepto Neratius scripsit, non esse ejus rationem anxie inquirendam ne multa ex his quae certa sunt, subvertantur id Galliae moribus aptari verissime, possit quod plerumque omni ratione destituantur petiti, partim ex jure Gallico, partim ex imperitorum sententiis male coherentibus.*

'Tis true, the Reformers and Reducers of our *Customs*, have corrected abundance of unjust Things, which Use had introduc'd; but it was impossible for them to make a perfect *Law* from the bad Principles they had to work upon; and therefore, the *Oracles* of the *Customary Law*, when he undertakes to explain some of the Articles of our *Customs*, exclaims in many Places, *O the unjust Custom! O the extravagant Custom!* He shews how it came to pass, that so many unjust and odious Dispositions remain among our *Customs*, and imputes it partly to the *Attornies* or *Practitioners*, who made the *Registers* of which the *Customs* were form'd; and partly to the *Commissioners*, who did not allow themselves Time, nor take the Pains a Work of that kind requir'd.

Chopin, de Comm. Gall. consues. Part I. N. 4. ascribes it wholly to the Officers of the several Places, whose Business it was to draw up the Substance of the *Customs* in Writing: He says, they inserted Articles for their own, or the Interest and Conveniency of their Friends.

Mornau,

Of the Excellency of the Roman Law. 141

Mornac, *Ad Leg. 2. §. 5. ff, de Origin. Juris*, says, "There are many obscure Things in our *Customs*, which are owing to the Negligence of those who reduc'd them; and that they were often put in by Design.

The *Commissioners*, whose Names are at the Head of the Proceeding, were too precipitate in the Execution of their Commission, and often did nothing more than hear the *Custom* read in their Presence, and refer contested Matters to the Court, which never decided them: Besides, 'tis impossible that Order or Method should be thought of, in such tumultuous Assemblies: So that in the manner our *Customs* have been reduc'd, 'tis hard to believe, the *Magistrates* who were intrusted with it, were Men of great Understanding.

All these Circumstances and Reflections, are but too strong Arguments, to shew the Difference we ought to make between the *Roman Law* and our *Customs*; nor is there any one but knows, in how many Respects the *Roman Laws* are superior to our *Customs*.

Those *Laws* were made with all the Precaution imaginable, and were the Work of the greatest and most learned Men of those Ages; on the contrary, the *Customs* were reduc'd in haste, upon the Report of Practitioners, who were unable to give any Reason for the *Usages* they observ'd were then in vogue.

The greatest part of the *Roman Laws*, are in an easie elegant Stile, and put under Titles suitable to the Nature of them: But our *Customs* are generally immethodical, and the Stile of them harsh and obscure, and consequently, hard to be understood and remember'd.

All kind of Matters, as well of an Ordinary as Extraordinary Nature, are explain'd in the *Laws*; but our *Customs* are confin'd to a few particular ones, as has been before observ'd.

In short, the Decisions of the *Roman Law* are so Judicious, that they infinitely surpass every thing that has been done by the *Legislators* of other Nations; but the greatest part of our *Customs*, are the Production of mere Chance, or of the Fancy of those who have suffer'd themselves to be led, rather by certain *Usages* than Reason.

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142 *Of the Excellency of the Roman Law.*

Therefore, the *Customs* are reckon'd as so many *Facts*, of which the *Judges* are presum'd to be ignorant ; altho' they are at this Day reduc'd to Writing, as *Fontain* has observ'd, in his *Additions to M. Bourdin's Paraphrase*, Art. 42. And perhaps, this is the Reason, that when an *Advocate* reads an Article of the *Customs* to the Audience, he is uncover'd as if he were reading a Play ; because the *Customs* are particular *Usages*, which no one is oblig'd to know : But if he is to quote any Text of the *Laws*, he is not uncover'd ; nor is he allow'd to read it out of the *Digest* or *Code*, but having it written on a Paper, is to recite it as it were by Heart ; because the *Judges* and *Advocates*, are suppos'd to know the Dispositions of the *Common Law*.

Let no one, therefore, any longer pretend, that the Study of the *Roman Law* is useless : So bold a Paradox, ought at least to be supported by some Colour of Reason ; But what do all the Reasons that are brought to maintain this Assertion, amount to ? Why, they say, the Science of the *Roman Law*, is a Matter of mere Curiosity, which recompences those who are at the Pains to obtain it, with nothing but a Confusion of Maxims ; without the Help of which, they might make as good a Progress in the Study of our *Law* ; to prove which, they say, that this *Law* treats of several Matters not in use amongst us.

This Objection is easily answer'd ; for, granting that the *Roman Law* does contain some Matters which are not in use with us, must it from thence be concluded, that the Science of that *Law* is useless ? It treats of other Matters that are in use with us, and which relate both to the Preservation of the *State*, and the Order of *Civil Society* : Must we then reject a Work which in general is so useful, because some Things in it are not applicable to the present Use ? Besides, in the *Customary Part of France*, the *Roman Law* is observ'd no farther than as Reason : Now it happens every Day, that the Reasons, upon which the Principles of Matters not in use amongst us are grounded, may be very fitly apply'd to those which are frequently in use.

In short, having these strong Reasons and Authorities on our Side, may we not say, that if any one attacks the *Roman Law*, 'tis for want of knowing its Beauty and Solidity ? How often does it happen, that the best and most useful Sciences are rejected thro' Ignorance ? Nothing is more com-

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Of the most celebrated Interpreters, &c. 143

mon, than to see Men, thro' Weakness or Indolence, declare against a thing that requires Pains and Application; either they have little hopes of Success, or rather, strange Apprehensions of the Difficulties which inseparably attend all Beginnings; and 'tis true, they can excuse their Caprice in despising what they are ignorant of, or justify their Idleness, in crying down what ought to have taken them from it.

But if there are some at the *Bar*, who are prejudic'd against the *Roman Law*, there are, without Comparison, a far greater Number, who looking upon it as the Source of indubitable Maxims, adhere to it with the utmost Attention; which is what all our able *Magistrates* and *Advocates* have ever done; nor have they fail'd of a Reward, for making it the principal Object of their Application.

To conclude, is there any likelihood, that Men of Sense, who have not, as one may say, a Moment's time they can call their own, would take so much Pains as they do, in a Study that could be of no advantage to them?

C H A P. XXX.

Of the most celebrated Interpreters of the Roman Law.

MEsinks, this *History of the Roman Law*, would be in some measure imperfect, if I should say nothing of those, who by their Works have contributed to the better understanding thereof; wherefore, I thought my self oblig'd to give some Account of the principal *Interpreters* of this *Law*. The Reader must not expect here an Historical Library of every Author that has wrote upon that Subject; my Design being only to shew Beginners, those who have most signaliz'd themselves in that way, and whom they will find mention'd at every turn.

AZO, was one of the first who took any Pains in the Study of the *Roman Law*; his *Summaries* upon the Titles thereof, are an excellent Work. He was born at *Bologna* in *Italy*; 'tis held, that he profess'd the *Law* about the Eleventh Century: The Enemies which his Merit rais'd him, oblig'd him to leave his Countrey, and go to *Montpellier*, where he profess'd the *Law*; afterwards, he came back to *Bologna*, where having taught the *Law* some time, he died in 1200, or as others say in 1225. There goes a Story of his being Hang'd, for killing *Bulgarus* in the Heat of a Dispute; but 'tis not warrant'd by any Writer of those Times.

ACCURSIUS, a Native of *Florence*, began to study the *Law* when he was Forty Years old, under the famous *Azo*; in which he made so swift a Progress, that he soon out-stripp'd his Master. He profess'd the *Law* publickly at *Bologna*, and after that retir'd, in order to writé upon the Explanation and Concordance of the *Law*: This Work, which cost him Seven Years hard Labour, prov'd so useful, and answer'd his Expectations so well, that he destroy'd all the Glosses he had before made; yet, he sometimes reports *Laws* that are nothing to the Purpose, and gives others a very wrong meaning; but all that, as well as the Contradictions for which he is blam'd, proceeds, possibly, from his having too hastily collected an Heap of his Predecessor's Opinions: Besides, there are many Decisions taken to be his, which are reported from others; which Mistake is owing to his making use of the first Letters only of the Authors Names in his Quotations; those Letters, thro' the Negligence of Copyists, having been often omitted: However that be, he was formerly of so great Authority, that he was called *The Advocate's Idol*. Certainly he was a Man of great Parts, and the Barbarisms we meet with in his Writings, ought to be imputed to the Unpoliteness of the Times.

Cujacius, who finds fault with him in several Passages, even to ridicule him, could not forbear praising him in his *Observations*, Book 3. Chap. 11. and Book 12. Chap. 16. And those who have Judgment enough to compare *Accursius's* Glosses with *Cujacius's* Explanations, will find them to be the very same, excepting the Order and Style. He died in the
Year

Year of Christ 1229, Aged 78. His Tomb is to be seen in the Church of the *Franciscan* Friars, at *Bologna*, with this Inscription, *Sepulchrum Accursii Glossatoris Legum & Francisci ejus filii.*

BARTOLUS was born in 1300, in a Village of the Province of *Umbria* in *Italy*; He was Professor of *Law* at *Pisa*, at the Age of Twenty five; after that, he taught it at *Perouse*, in 1350. He was a Man of a very bright Wit and Penetration, and so studious, that nothing could divert him from his Books. His surpassing Merit, made him reckon'd the best Interpreter of the *Laws*, next to *Accursius*. He was of the Council to the Emperor *Charles IV.* who permitted him to bear the Arms of *Bobemia*; but having no Children, that Honour died with him. He was so severe and strict a Follower of the Letter of the *Law*, that being a *Magistrate*, he executed his Office with so much rigour, that he drew upon himself the Hatred of the People, which oblig'd him to retire into the Countrey, where he compos'd some part of his Works, that are now extant: His Writings are full of Learning, but very Unpolite. He wrote upon the *Institutes*, some Books of the *Code*, and a good part of the *Digest*, and made a Book of the Councils. He died in 1355, Aged 56.

BALDUS, was the Son of a Learned Physician of *Perouse*; He studied the *Law* under *Bartolus*, and with so good Success, that he was thought to have improv'd that Science, more than any that went before him; which made *Jason* frequently say, that *Bartolus* knew every thing.

Some have reported, that he did not begin to apply himself to the *Law*, till he was Forty; which seems to have little Truth in it, because *Pancirole* proves, that when he was but Fifteen, he rais'd a very puzzling Objection against his Master *Bartolus*; and at Seventeen, read Publick *Law-Lectures*. He was *Præceptor* to Pope *Gregory XII.* His great Skill in the *Law*, got him so much Reputation, that *John Galeas Viceconti*, Duke of *Milan*, brought him to the University of *Pavia*, where he continu'd Professor of the *Law* for Fifty six Years. He was much talk'd of for a quick Repartee, when he first enter'd the Schools at *Pavia*: For, being a very Diminutive Person,
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146 *Of the most celebrated Interpreters*

some of the Auditors upon his Entrance said, *Minuit præsentia famam* ; to which he instantly reply'd, *Augebit carera virtus.*

He often pleaded against his Master *Bartolus*, and the Emulation between them, turn'd at last to perfect Hatred. He got a great Estate, and wrote several Books. His Writings, which favour very much of the Barbarity of the Times, are not altogether free from other Faults: He advances a Thousand Singularities, without the least Authority, and some that are quite contrary to the common Opinion. He has little or no Order in any thing he treats of ; he often quotes *Laws* that are foreign to the Purpose ; is very large upon useless Matters, and passes slightly over those which are most necessary. He says nothing upon Cases that arise every Day, and is very Learned upon those that seldom or never happen, and often confounds himself with his own Subtilties.

He died *April 28. 1400* ; there is something melancholy in the Nature of his Death, He was bit in the Lip by a little favourite Dog, which turn'd to an incurable Distemper.

PAUL, called **DE CASTRO**, because he was born at *Castro*, a Town in the Kingdom of *Naples*, flourish'd in the Fifteenth Century : He profess'd the *Law*, in several Universities of *Italy*, for Fifty Years, his Explanations upon the *Laws* of the *Digest* and *Code*, are in so great Esteem, that *Cujacius* says, *Qui non habet Paulum de Castro, tunicam vendat & emat.* He died in a very advanc'd Age, in 1437.

BUDEUS, was of a Noble Family, and born at *Parù*, 1467. He spent Three Years at *Orleans*, and after that, some at *Parù*, in the Study of the *Law*, but made no great progress therein: At last, his Inclination to Learning got the better of his Pleasures ; and tho' his Friends represented to him the Danger of destroying his Health, by his close Application to Study, no Persuasions could draw him from it ; and that he might follow it without Interruption, he retired to the Village of *Hieres*, in the neighbourhood of *Paris* ; where, in a very short time, he acquir'd as much Learning, as if he had had the best Master, and the most worthy Competitors to animate and inspire him with Emulation.

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He soon gave Publick Marks of his Improvements, and after having translated some Greek Authors, put out his *Observations* upon the Books of the *Roman Law*. Francis I. made him his *Library-Keeper*, and *Master of Requests*. The excessive Heats in the Year 1540, having oblig'd the King to retire for Air towards the Coasts of Normandy, Budeus went with him; but being seiz'd on the Road with a violent Fever, he return'd home, and died the Twenty third of August, 1540; leaving behind him a numerous Family, of Four Sons and Eight Daughters.

JOHN PAUL, ALCIAT, a *Milanese* Gentleman, was the first, as Mr. de Thou says; who united the Study of the Law with polite Learning, and the Knowledge of Antiquities. His Works upon the Law, and his Emblems, are Proofs of his great Capacity and Judgment. Francis I. brought him into France, where he taught the Law at Avignon and Bourges; after that, passing the Alps, he profess'd it at Bologna, Ferrara, and lastly, at Pavia, where he Died; in the Year 1550. His Epitaph, which I have here set down, is to be seen in the Church of St. Epiphania: *Andrea Alciato Mediolanensi Jurisconsulto, Comiti, Protoſecario Apostolico Casareoque Senatori, qui omnium doctrinarum orbem absolvit primus Legum studia antiquo restituit decori, vixit annos 38. menses octo, dies quatuor obiit pridie Idus Januariæ, anno 1550.*

FRANCISCUS CONNANUS, *Sieur de Coulon* and *de Rebestan*, was a *Parisian*, and Son of one of the Judges of the *Exchequer*, or *Masters of Accounts*. He studied the Law at Orleans, under Peter Stella, and at Bourges, under the famous Alciat, who was so taken with his Wit and great Parts, that he shew'd him all possible Marks of his Esteem. At his return to Paris, he follow'd the Bar, and was afterwards a *Master of Accounts*; and at length, preferr'd by Francis I. to be *Master of Requests*, in 1544. He was so zealous to improve this Study that he undertook to reduce it to a Method; but the Tenderness of his Health, prevented his finishing it: He was but Forty three, when he died, which happen'd in September 1551.

148 *Of the most celebrated Interpreters*

BARONIUS, a Native of *Leon* in *Britany*, profess'd the *Law* with *Duarenus*, at *Bourges*; the Emulation between these Two Learned Men, set them at Variance. We have a *Commentary* upon *Justinian's Institutes*, some *Interpretations* upon the other Books of the *Law*, and a *Treatise of Benefices*, and some other Matters, written by the first. He died *August* 22. 1550. Aged 55.

DUARENUS, was born at *Brien* in *Britany*, where his Father was a *Judge*, and whom, tho' very young, he succeeded in his Office. He came to *Paris*, in the Year 1536; where he read Lectures upon the *Pandects*, I suppose, as Deputy to some Professor: He was intimately acquainted with the Learned *Budeus*, who imparted to him much of his Knowledge of the *Greek Language*, and *Roman Antiquities*: He took great Pains whilst he was at *Paris*, to improve *Budeus's* Three Sons in the *Law*; being willing thereby to repay the Obligations he ow'd their Father.

He was sent for to *Bourges*, in 1538, Three Years after *Alciat* left that Place; that he might join the Practice with the Theory of the *Law*, he quitted his Professorship, and came to the Bar at *Paris*, where he staid only Three Years or thereabouts: *Baudwinus*, who succeeded him in the Faculty at *Bourges*, prevail'd upon his Collegues to recal him; and to remove all Obstacles, yielded to him the Point of Precedency.

The Dutcheß of *Berry*, Sister to *Henry II.* increas'd his Pension, as Chief Professor of the *Law*, and made him her Master of Requests: So that no Body, except *Alciatus*, acquir'd so much Reputation in that University. His Writings, which are perfectly free of the Barbarism of the Glossaries, contain nothing but the pure Sources of the *Roman Laws*. The desire he had, not to share this Honour with any Man living, made him jealous of his Collegue *Baronius*; but that ended with *Baronius's* Death, and turn'd into so passionate an Esteem, that he endeavour'd all he could, to perpetuate his Memory, by erecting a Monument in honour of him, which he adorn'd with an Epiph. This kind of Behaviour, which is very common between Men of the same Profession, seems to be elegantly describ'd by *Horace* in this Verse;

Vixit enim præsens, extinctus amabitur idem.

Dua-

Duarenus had other Collegues, who reviv'd his Disquiet; He could not with any Patience see *Bodwinus* out-strip him; and his Death, instead of easing him of his Pain, did but encrease it, when he found *Cujacius*, who had more Merit, succeeded him: The Quarrels that arose between them, would have ruin'd the University of *Bourges*, had not *Cujacius* given way, by retiring to *Valence* to teach the Law there. *Duarenus's* Works were always in great Esteem, among the Learned, and *Cujacius* himself valu'd them exceedingly; for notwithstanding their frequent falling out, he us'd to say, he was much oblig'd to his Collegue, for making him double his Pains, which had greatly contributed to his Advancement. However, it is to be observ'd, that the Works of *Duarenus* upon the *Canons*, infinitely surpasses all that he has wrote upon the *Civil Law*. He died in 1559, Aged Fifty Years.

DU MOULIN, descended from a Noble Family, was born at *Paris*, towards the latter End of the Year 1500: He came to the Bar at Twenty five; and follow'd the Study of the *Roman*, *Canon*, and *French Law*, with such Application, that his Name soon became famous all over *Europe*. He us'd to say of himself, *That he would neither yield to, nor be taught by any one*; which Saying would have become any other better than him. He had a vast and transcendent Genius, more than is to be express'd; his Learning was not to be equall'd, and he had the Theory, join'd with the Practice of the Law, in the highest Perfection. But how great soever his Knowledge of the *Roman Law* might be, he was infinitely more Learned in the *Canon*, in our *Usages* upon *Beneficial Matters*, and in the *French Law*.

He was ever at Work, and had read so many Books, that 'tis incredible: He lov'd studying so much, that he refus'd to be made a *Counsellor* in the Parliament of *Paris*, lest it should take him from his Reading. Yet, there is one Fault in this great Man's Works, that is, his Style; which he form'd after the Model of the *German* Authors, having read a prodigious Number of them: He seems to have borrow'd from them that harshness of Expression, and confused manner which appears in all his Questions; but his Penetration and Exactness, in starting all the Questions that can possibly arise upon the Subject he handles, is so

wonderful, that not one escapes him. He examines them with such a Depth, and states the Reasons of doubting with so much Skill, that the Reader is puzzled which Side to take: Then he determines with so much Judgment, and such convincing Proofs, that one cannot help condemning the very Uncertainty, which those Reasons of Doubting had occasion'd: So that one may liken him to the Sun, which still casts Light, notwithstanding the Opposition of the Clouds. In short, there never was in *Europe*, nor ever will be, a Man of so deep and penetrating a Genius, and so laborious, as Monsieur *Charles Du Moulin*.

His Life was chequer'd with good and bad Fortune: He died at *Paris*, in 1566.

BALDWINUS was born at *Arras*, the First of *January*, 1620. His Father was a *Counsellor*, and the King's chief *Advocate*. He studied *Latin* and *Greek* at *Louvain*, and afterwards turn'd to the *Law*, of which he render'd himself Master the more easily by living with *du Moulin*. Afterwards he profess'd the *Law* at *Bourges*, for Seven Years; and then at *Strasburg*, *Heidelberg*, *Douay*, and *Besancon*; from whence *Henry III.* then King of *Poland* only, sent for him, and made him one of his *Counsellors of State*: As he was preparing to follow that Prince into *Poland*, a violent Fever carried him off, on the Twenty fourth of *October*, 1523. his Body was buried in the Cloyster of the *Masburins*, in the College of *Arras* at *Paris*. We have several of his Works that are in pretty good Esteem; amongst the rest, a *Commentary* upon the *Institutes*, and another upon the *Laws of Romulus*, and the *Law of the Twelve Tables*.

Mr. de Thou, calls him a *Lawyer* of a *sure Judgment* and *exact Diligence*; and *Cujacius* us'd to say of him, *That he had a better Head for the Law than himself, if he would but have taken a little more Pains*: However that was, *Baldwinus* was not insensible of the Emulation that reign'd then among the chief *Lawyers* of his Time; so that by endeavouring to make himself able to contend with them, he acquir'd a great Knowledge of the *Law*, of which the Books he left behind him, as well as the great Esteem *Margaret* *Duchess of Savoy and Berry* had for his Worth, are uncontestable Proofs. He died at *Bourges*, in 1586, and was buried in the Church dedicated to *St. Hypolitus*, near the famous

mous *Duarenus*, who was his Adversary. Thus Providence was pleas'd, that those Two who could never agree together in their Lives, should rest together after their Deaths.

HOTOMANNUS, originally descended from a *German* Family, was born at *Parn*, *August* the Twenty third, 1524. He begun about Fifteen to study the *Law* at *Orleans*, and after Three Years spent therein, obtain'd a Doctor's Degree. His Father, who was a *Counsellor* in the Parliament of *Paris*, put him to the Bar, with a Design of bringing him into his own Employment; but the young Man, had more Mind to follow the Study of the *Roman Law*, and other polite Learning: 'Tis said, he read Publick Lectures in the Law-Schools in *Paris*, at the Age of Twenty five. He was afterwards Professor of *Law* at *Straasbourg*, and then at *Valence*; the Credit of which University was very much increas'd by his Merit. He was call'd to *Bourges* Three Years after, by *Margaret* of *France*, King *Henry* the Second's Sister; from whence he went to *Geneva*, and after teaching the *Law* there for some time, he went to *Basle*, where he died in 1590, Aged Sixty five Years. He left Two Sons, and Four Daughters: The Eldest *John Hotoman*, Author of the Burlesque Piece called *Antichopinus*; and of *Anticolasion*, which is an Apology for his Treatise of the *Ambassador*.

The Father, who is here spoken of, was so famous a *Lawyer*, that *St. Martbe* makes him almost equal to *Cujacius*; yet, 'tis certain, he minded the *Antiquities*, more than the Decisions of the *Roman Laws*.

CUJACIUS, the most celebrated of all the *Interpreters* of the *Roman Law*, was born at *Tholouse*; his Parents were of the Scum of the People; but Nature made him amends for the Baseness of his Extraction, by endowing him with a Genius, next to a Prodigy: He learnt the *Greek* and *Latin* Languages, without the Assistance of any Master. He was better qualify'd than ever any Man was, to be an excellent Professor of the *Law*; I mean, by the Uprightness of his Heart, the Clearness of his Understanding, his sound Judgment, accompany'd with polite Learning, and an exquisite Discernment; to all which, he added an indefatigable Application,

These extraordinary Qualifications, one would think should have procur'd him a Professorship ; yet, his ungrateful Countrey, after putting him to the Trouble and Fatigue of a Dispute, prefer'd his unworthy Competitor ; which crying piece of Injustice, made him leave *Tholouse* ; and 'twas, perhaps, on this Occasion that he said, *Ingrata patria non habebis ossa.*

M. de l'Hopital, afterwards Chancellor of *France*, fetch'd him to *Bourges*, from *Cabors*, to which Place he had retir'd : He profess'd the *Law* near Forty Years ; sometimes at *Tholouse*, sometimes at *Cabors*, then at *Bourges*, and *Turin* ; and lastly, again at *Bourges*, to which he retir'd at the pressing Instances of the *Magistrates*.

He had every where a full Audience, his Scholars follow'd him up and down, and his great Reputation, got him every day new ones : He never gave an Opinion, which he did not think infallible ; nor made any scruple to require time, if he was in the least doubt of answering the Question propos'd to him, with that Confidence and Certainty, which usually attended his Determinations : And tho' his Penetration was very great, whether he undertook to interpret or reconcile the seeming Contrarieties of the *Law*, He always spent Seven Hours in preparing for every Lecture ; [and by that means, was able to personate all those great Men, whose *Decisions* compose the most valuable Parts of the Body of the *Law*. In short, his Writings have the majestick Gravity of *Papinian*, the rich Abundance of *Ulpian*, the Sweetness and Chastness of *Paul*, and the Conciseness and Sententiousness of *Africanus*.

In a Word, 'tis easie to perceive, that he had united in himself, all those different good Qualities, which were distributed among those great Men, and made them admir'd by the World : But that which is most to be esteem'd, and agreeable to Civil Society, is, that none of these Perfections were eclips'd by any of those Blemishes which Learned Men are often subject to. His deep Meditations had not sour'd his Temper ; nor was his vast Knowledge accompany'd with the least Pride : He was Affable and Modest to all the World, heard every one kindly that address'd themselves to him, instructed them with Patience, talk'd to them with the utmost gentleness, and always sent them back charm'd with his Treatment, and made of them

them so many Friends. A Learned Man, may by Skill in his Profession, attract the Admiration of the World ; but if he would be beloved, he must add Mildness and good Manners to his Learning, which *Cujacius* has shewn us are not incompatible.

The prodigious Quantity of his Works, and the Correctness in all of them, are invincible Arguments of the Beauty of his Mind, and unwearied Application : He has explain'd, *ex professo*, most of the *Roman Laws* ; and there are scarce any that may not be understood by the help of his Works.

Pope Gregory XIII. appriz'd of his great Worth, and knowing that he had penetrated farther into the Mysteries of the *Roman Law*, than any other, endeavour'd to bring him to *Bologna*, by offering him a very considerable Salary.

He was *Honorary Counsellor* of *Grenoble* and *Turin* ; but his Infirmities and Business, did not often allow him to make any Advantage thereby.

M. de Thou says, that *Cujacius* was the First and the Last, since the Antient *Lawyers*.

He died at *Bourges*, in the Year 1590, Aged Sixty eight or Seventy Years. All the Orders of the Town, in several Bodies attended his Funeral ; and the next Day after his Burial, *M. Marechal*, *Counsellor* in the Parliament of *Paris*, who had formerly been his Scholar, publickly made his Funeral Oration.

Papirius Masson, who wrote the Abridgment of this great Man's Life in *Latin*, has collected abundance of Epitaphs made in honour of his Memory.

When he was dying, he forbid the publishing of any of his Works but what he had already put out ; yet, all that could be got of his Writing, has been since printed : He also order'd, that his Books should be sold by Detail ; with a Design of disappointing such as might collect his *Annotations* on the Margins, and publish them at the Expence of his Reputation ; having made them only for himself, without that Order or Method that is requisite in Writings design'd for the Press.

I cannot omit mentioning here a kind of Dispute, between some of the Learned, which ought to have the Preference *Cujacius* or *Du Moulin*.

ANTONIUS FABER, a Native of *Bourg* in *Bresce*, was a long time the Chief *Magistrate* there : After the Exchange of the Province, the Duke of *Savoy* being unwilling to lose so useful a Man, made him President of the Council at *Geneva*, and afterwards, of *Chambery*.

This able *Magistrate*, in the midst of all his great Employments, dedicated some of his private Hours to the Publick ; He made several *Commentaries* upon the *Law*, which are printed in Eight Volumes in *Folio*. He has carry'd his Notions a greater length than any of the Moderns. He had a vast Understanding, which was never discourag'd by the greatest Difficulties ; but he is justly accus'd of deciding too *Magisterially*, contrary to the receiv'd Opinions ; and of taking too great a Liberty, in adding to or clipping the *Laws* : He carries his *Niceries* too far, and a Man must be aware, lest he be misled by them ; for in going from the common Opinions, he also frequently leaves the Principles. In a Word, 'tis impossible to express the Subtilty of this Author, but he is very far from being sure.

Bacovius, a German Author, has wrote against the Second Part of his Book, *De Erroribus Pragmaticorum* ; and *Fer. Borgias*, of *Naples*, has censur'd his Treatise *De Conjecturis* ; but it must be allow'd, their Criticisms are not all of them just. His *Code* is reckon'd the best, and least faulty of his Works, in that he does not ramble, but generally keeps to adjudg'd Cases : But notwithstanding all the Faults in his other Works, it were to be wish'd he had lived to finish Two ; that is, his *Rationalis*, which goes no farther than the Twenty sixth Book of the *Digest*, and his *Jurisprudencia Papiniana*, wherein his Design was to have comprehended all the *Law*, according to the Order of the *Institutes* ; but he made only the First Book. He died in 1622, Aged Sixty seven Years.

ANTHONY MORNAC, Advocate in the Parliament of *Paris*, was one of the most famous Lawyers of his Time, remarkable for his great Probity and Learning : To his Skill in the *Roman Laws*, he added that of the Practice of the Bar ; and had undertaken a Comparison between the *Roman* and the *French Law*, a Work that deserves the highest Commendation, but he did not live to finish it ; what we have of it, is enough to make us regret the Loss of

the rest, it were to be wish'd some able Hand would continue, and might have the Happiness of finishing it.

I could here mention several other *Lawyers*, whose Writings have contributed to facilitate the Study of the *Roman Law*; but it would be an endless Work: And I gave the Reader to understand in the Beginning of this Chapter, that my Design was only to mention the most renown'd of them; those who are desirous of knowing the rest, need only consult the Book intitled, *Le Bibliotheque des Interpretes du droit*; written by M. Simon, Counsellor in the *Presidial Court*, and *Affessor* in the *Marshalsea* at *Beauvois*.

C H A P. XXXI.

Of the Dispositions requir'd for the Study of the Roman Law.

It is true, that nothing can be more serviceable to such as embrace the Profession of the *Law*, than the Study of the *Roman Laws*; it is also necessary they should bring these Dispositions with them, which are requisite to make them full success therein.

It is with the *Roman Law* as with most other Sciences; I mean, that such as desire to be Proficients in it, must besides natural Talents bring with them a sincere Desire of Learning.

Among these Natural Talents, we must reckon first, *Reason and Judgment, good Memory, and clearness of Expression.*

And if it be certain, that all Men ought to labour as much as possible to form their Judgments; it is yet more incumbent upon those who follow the *Law*, to have their Judgments form'd before they begin: And indeed, as the *Laws* are nothing else, but the Result of the Meditations of a vast Number of wise and understanding Men, is it possible their Beauty should be perceiv'd, by such as have not Discernment enough to follow that which is most Reasonable? The Principles of the *Civil Law*, being only an Emanation from the

the *Law of Nature* and *Nations*, we must first learn their Principles, before we enter upon the *Civil Law*.

A right Conception is no less necessary in Studying the *Law*; for by that means, we are enabled to discover the Circumstances, which make the Difference in two Cases, that at first sight appear to be intirely the same.

To soundness of Judgment, and a right Conception, we must add a good Memory; *We know nothing*, says the *Roman* Orator, *but what we remember*: Therefore, it would be in vain to take Pains to learn the Definitions and Principles of the *Law*, unless the Student can retain them; besides, as the Number of the *Roman Laws* is vastly great, and have either a great Conformity, or a very apparent Opposition, 'tis not sufficient to have a lively Memory, but it must be strong and unconfus'd.

Memory is generally reckon'd a mere Gift of Nature, altho' Experience sufficiently justifies, how much it may be improv'd, by Care and Vigilance; this must be done by daily Exercise. Nature is generally more liberal to us, than we are grateful to her, and seems to require nothing more in return for the Talents she bestows upon us, than the necessary Exercise for their Cultivation and Increase; yet, how many are there that never think of this Matter? And whilst some neglect to improve the Gifts they have receiv'd, we see others by Care and Pains repair the Injury Nature has done them, by her Parsimonious Hand.

Let not those who complain of a bad Memory, ever despair of mending and making it more happy; Let them know, that as it may be quite lost for want of Exercise, 'tis strengthen'd by employing it; 'tis true, if it be over-burden'd, 'twill be difficult for it to answer our Expectations; but when manag'd prudently, will acquire more strength. A continual Exercise, with Moderation, accustoms it insensibly to what we expect from it; but Experience has put this Matter beyond Doubt, and therefore, I shall not enlarge thereupon.

Clearness of Expression is another Qualification, requisite in such as would succeed in the Study of the *Law*; because without it, it would be impossible to unravel the nice Distinctions, in which the Point of Decision often lies.

I agree, that all Men are not born with these Dispositions, and that 'tis very seldom they are all found, in any eminent Degree, in the same Person ; but to begin the Study of the Sciences, 'tis sufficient that Nature promises these Accomplishments, and shews an early Disposition, which by Care and Application, will with Time, infallibly ripen and come to Perfection.

After these Natural Talents, we have already observ'd, all Students in the *Law*, ought to be animated by a strong Inclination for Study ; for the Mind and Memory are averse to Burthens that are disagreeable to them.

Lastly, The Study of the *Law*, ought to be preceded by a perfect Knowledge of all kind of polite Learning, especially the *Roman History*.

As to polite Learning, if it be requisite for making a Progress in all other Arts and Sciences, 'tis much more absolutely so in the Study of the *Roman Law* ; the Proof whereof is easie : The *Roman Laws* were compos'd, as I have already often said, by the most Learned and Wise Men that flourish'd in different times at *Rome* ; and therefore, were conceiv'd in such proper and apt Terms, that it would be very difficult to put others in their Places of equal Energy, and consequently are to be understood only by such as by their Studies, have contracted a Familiarity with the Expressions made use of in the purest *Latinity*.

In regard to History, I have spoken so fully in the Beginning of this Work, concerning the Relation of the *Roman Laws*, to the *History of that People*, by whom they were made, that I need say no more here on that Subject.

It may therefore be safely concluded, that such as have reap'd no other Benefit from their Studies, than the Dust of the Schools, are in no Capacity to undertake the Study of the *Roman Law* ; which sublime Science will not discover it self, but to those, who by improving the Endowments Nature has given them, have laid in a great Stock of Learning : Besides, they must employ in Study a sufficient time every Day, for many Years ; for how diligent soever a Student in the *Law* may be, it will be a great while before he is sensible of the Progress he has made therein.

And tho' these Difficulties that arise from the vast Extent of the *Roman Law*, may intimidate young Beginners, they will find in themselves Motives to spur them on, if they have improv'd as they ought, by their Lessons in the Classes.

The Glory of Success, is proportion'd to the Pains and Labour that attends it; and the Difficulties, how great soever they may be, when we are able to surmount them, discourage none but those, who either have no Ambition for Glory, or want Perseverance to deserve it.

Whatever Pains the Application which the Study of the *Law* requires, may cost, the Advantages that accrue by it, are more than a sufficient Recompence; which Consideration, ought to encourage Youth to employ their whole time in a Study, the End whereof is not so much to obtain Degrees, as to improve their Understanding, and refine their Reason.

By what is here said, 'tis evident I have not been over-studious to conceal the Difficulties of the Study of the *Law*, and the Time it requires. In the next Chapter, I shall shew the shortest and most easie way to succeed therein; which I think my self the more oblig'd to do, the End of this Work being to point out to Youth, the Course they are to observe in the pursuit thereof.

C H A P. XXXII.

Of the Method to be observ'd in studying the Roman Law.

EVERY one knows, that to be in a Condition to make any Progress in the Study of the *Law*, *Justinian's Institutes* must be the first Book we read, they are the first Elements of the *Law*, made by Order of that Emperor, for the Benefit of the Youth who have a mind to apply themselves that way: They cannot be too often read, nor too perfectly learn'd, since they contain an Abridgment of the whole Oeconomy of the *Roman Law*.

To succeed herein, the *Definitions* and *Titles* are first to be learn'd by heart; then the *Text* is to be read over carefully, with the *Notes* made by *Vinnius* thereupon; after which, it will be very easie to reap the Advantage of the *Commentaries* made in the Schools; the *Paraphrase* of *Theophilus* will be of great help towards a right Understanding of the *Text*, by means of the several Cases therein reported upon most of the *Paragraphs*.

As to the *Text* of the *Institutes*, we must not be satisfy'd with once reading it; we must turn it over and over, and as far as possible retain it: For it is the *Text* that is the chief Object of their Application, who desire to make any Progress in the Study of the *Law*; the right Sense of which cannot be taken, unless the very Terms are known. The Style, in the Body of the *Roman Law*, especially in the *Institutes* and *Digest*, is so fine and pure, the Terms are so proper and well-chosen, that there is no making use of any other, without running the Hazard of forsaking their true meaning, or at least rendring them obscure.

One thing, which Beginners ought especially to take Care to avoid, is the reading of abundance of Books: We ought to make choice of the Best, read them often, and endeavour to understand and retain their Substance; above all, we ought not to meddle with large Commentaries, which are rather apt to confound than help Beginners: A plain and

easy way is what Youth is pleas'd with; by which Means, being encourag'd with the Progress they make, they are insensibly accustom'd to a noble Emulation and Exactness, that leads them by Degrees to all sublime Learning.

The reading the *Institutes*, ought to be follow'd by that of the the Two last Titles of the *Digest*, which it is fit also to get by heart; one of them contains the Explanation of those *Laws*, in which there is any *Ambiguity*, the other the Rules of the Ancient *Law*; that is, certain General *Decisions*, taken from the *Lawyers Writings*. The next to be studied, are the *Paratitles* of the *Digest* and the *Code*; after which, the Student will be in a Condition to come at the true Sence of the *Laws* themselves; having first propos'd the Case, and deduc'd the Reasons for doubting and deciding according to our common practice, in the Exercises which our Profession obliges us to make every Day.

I cannot help observing in this Place, that if their Private Studies are of great use to forward them in the *Law*, the Instructions which they receive in the Schools, when they are follow'd as they ought to be, are incomparably of more Service: Those who are oblig'd to make Publick Lectures, are under a Necessity of doing their utmost, to make the most abstruse and obscure Things clear and perceptible to the dullest Understanding: Besides, as St. Jerome says, *Habet nescio quid latentis energie viva vox alicuius in aures discipuli de auctoris ore transfusa fortius sonat*.

Another thing which must not be forgotten, is to look out, and make good the Quotations we find in the Books of the *Law*, and carefully to examine their Application: The reading over the *Laws* that are quoted, gives us a better Conception of the Sence: And therefore, those who have any skill in this profound and sublime Science, agree, that it is the only means to fix the Principles of the *Law* in the Memory; and even the greatest Difficulties, which, without such Assistance, would but too easily escape us: Therefore, we must be particularly careful in reading over and understanding the Texts that are made use of by those Authors, which we make use of to direct us in our Study.

'Tis not sufficient to read over the Texts of the *Institutes*; and the *Laws*, which are brought to explain some Principles; we must be able to understand what we read, and to retain it, in order to make a just Application thereof to such Questions as may offer. *Scire Leges non est verba earum tenere, sed vim ac potestatem*, L. 17. ff. de Legib. For which Reason, I thought my self oblig'd to set down here in a few Words, the Method to be observed therein.

The true Sense of a *Law*, is generally taken first from the *Law* it self; that is to say, the Terms in which it is conceiv'd: Secondly, from the Circumstances which may be suggested by the true Sense; to come at the Knowledge of which, we must first know, by whom the *Law* in question was made, upon what Occasion, and what was the Motive; and to whom it was directed. An Abstruseness in these Points is very disagreeable; and it is losing almost all ones Time, not to examine with Care, those Circumstances, which often serve to unravel the Difficulties that at first seem unsurmountable.

When we meet with *Laws* that are not to be understood by bare reading, we must have recourse to *Cujacius*, who is indisputably the best Interpreter of the *Roman Laws*, and most so to be rely'd on; and as we may happen to meet with some *Laws* not explain'd by him, the *Gloss*, and other Interpreters are then to be consulted.

I shall here lay down a few Rules, by which those that have already made some Progress in this Study, may know how to reconcile those *Laws* that seem contradictory.

The first is, when one *Law* is oppos'd to another, to be certain of the true Reading of both; for the Texts of many *Laws*, have been corrupted by the Ignorance of Scribes, employ'd to write over the Body of the *Law*, before the Art of Priming was discover'd; they often transpos'd Words, Stops, and Comma's, and even whole Periods: Which Omissions or Transpositions, have frequently given the *Law* a quite different, and sometimes a contrary Sense.

It was the same formerly with the Abbreviations made use of by the Writers, which had introduc'd into the *Laws* a prodigious Obscurity: Therefore, the Emperor *Justinian*, to take away that Inconveniency, commanded *Tribonian* and the rest of the Compilers, not to make use of them in the Composition of the *Digest*.

Antonius Augustinus has made a Book, *Emendationum*, in which he has corrected the Laws that have been corrupted by Omission, Addition, or Transposition of Notes, Stops, Comma's or otherwise. Cujacius and Faber, have also corrected several defective Passages in the Body of the Law; but the Corrections of the latter, are sometimes too bold, and therefore not to be blindly followed.

The second Rule is, to take notice whether the Terms of the Two Laws that seem opposite to one another, are not capable of receiving different Significations; for if a Word in a Law, be taken in a different Sense from the Author's meaning, we shall find abundance of Contradictions, where in reality there are none.

The third is, to see if One of the Two Laws which seem contradictory, does not contain an express *Devotion*, in the most rigorous Sense, and the other an *Equitable Tempera-*

The fourth is, to observe the Authors of those Laws which seem contradictory, and examine if they were not of different Factions: For the Lawyers, who were of different Schools and Sects, were also frequently of contrary Opinions, upon the same Question. I shall here instance some Laws, which are the Remains of their Disputations, and can be reconcil'd by no other means, than saying their Authors were of different Factions; Vide *Barbari ff. de Jurejurando juncta*, L. 5. ff. de Peculio, L. 9. §. 2. ff. de Acquir. rer. Dominio juncta, L. 23. §. 3. ff. de rei Vendicatione, L. 7. §. 7. ff. de Acquir. rer. Dominio juncta, L. 61. ff. de rei Vendicatione, L. 35. ff. de Peculio, cum L. 1. §. 10. ff. de dote Praelegata juncta, L. 1. §. 7. ff. Quando de peculio Alio Annulatus est, cum L. 18. ff. de peculio Legato.

The fifth is, to take notice of the Inscriptions of the Laws, and the Titles under which they are placed; for there are many Laws, which are not to be understood, but by the Relation they bear to the Titles whence they are taken, and which cannot be apply'd to Matters of another kind; *Multa generaliter accepta incautos fallerunt & restringi debent ad Argumentum libri unde desumpta sunt.* Vide L. 2. §. 1. ff. de iur. & Legitime hereditibus juncta, L. 3. ff. de ritu Nuptiarum, L. 153. ff. de Verborum significatione, juncta epigrapha ejusdem leg. L. 197. ff. eodem titulo juncta, L. 3. §. 14 ff. de Senatus Consulto Silianiano.

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The sixth is, to observe the Time, when the Two opposite Laws were made; *Sæpe enim distinguenda sunt tempora ut consilientur jura*; for that which was the last made, repeals the former: And herein we must take great Care to distinguish between the Ancient and the New Law; for many Laws in the Digest, have been mutilated by Tribonian, in order to accommodate them to the Law observed in his Time, which makes it impossible to reconcile them any other ways than by saying, *Passa sunt manum Triboniani*.

The seventh, is to examine carefully the State of the Question proposed; that is, whether it be *De genere an de aliqua specie*; for as the Orator says, *Lib. 2. De inventione Si ex contrariis Legibus controversia nascatur cum inter se due videntur, aut plures Leges discrepare, considerandum est utra Lex de genere omni utra de parte quadam, utra communiter in omnes, utra in aliquam certam rem scripta videatur*: The Questions, *De genere atque universo infinite sunt*; but those, *De specie sunt finite*: Wherefore, *Semper generalibus specialia insunt, sed specialibus non insunt generalia*: For Example, a Legacy of Alimony, does include Meat, Drink, Cloathing and Lodging; because the Body cannot be supported and maintain'd without them, *L. 6. ff. de Aliment. legat.* But not on the contrary; for a Legacy of Cloathing, does not comprehend either Alimony or Habitation.

The eighth is, to examine whether the Law that is opposite to another, does not give a different Decision for some particular Reason or Circumstance, which induc'd the Maker to go out of the common Road; *Quod jure singulari contra communes juris regulas inductum est non debet trahi ad consequentiam*.

The ninth is, to endeavour to find out the true Causes of opposite Laws, which is often the Way of resolving the greatest Difficulties, that we meet with in the Explanation of the Laws; *Ex facto enim jus quæritur*: To this End, the Terms of the Law are to be well examin'd; the right Understanding whereof, does not only lead us to the Fact and the Case upon which the Lawyers, Auspex or Emperor's Rescript was made, but also to discover the Rules and Principles of Law, by which the Question was determin'd.

166 Of the Quotations and Abbreviations.

If, notwithstanding all these Precautions, there still remains some Contrariety in the *Laws*, we must agree, that they are *Antinomies*, overlook'd by *Tribonian*, thro' Inadvertency; *Et enim contra Justiniani mandatum nonnulla contraria, & pugnantes Jurisconsultorum sententias in Pandectarum libris reliquit. Vide L. 1. ff. de usufructu accrescendo, juncta L. 20. ff. de Legatis 2^o. L. 15. ff. de rebus creditis; juncta L. 34. ff. mandati, L. 18. ff. de rebus creditis, juncta L. 36. ff. de Acquir. rer. Dominio. L. 82. ff. de Legat. 2^o. juncta L. 5. ff. ad Legem salvidiant, L. 22. ff. de Jurejurando, juncta L. 5. ff. de Peculio, L. 6. & 7. de servis exportandis. Vide etiam Cujacium, L. 8. Observat. cap. 9.*

In short, *Tribonian* has reported in the *Digest*, *Laws* that were utterly abrogated, or contrary to *Usage*, *Vide L. 45. ff. De pignoratitia Actione juncta, L. 12. de Pignoribus & Hypothecis, L. 122. §. 2. ff. de Verborum obligationibus, juncta L. penult. ff. Qui sine manumissione, &c. L. 9. ff. ad municipalem, juncta L. 5. ff. de statu Hominum.*

C H A P. XXXIII.

Of the Quotations and Abbreviations.

AS it is necessary in the first Place, to know how to make use of the *Quotations* which we meet with in the Books of the *Civil Law*; and to find out the several *Laws* quoted by Authors: I thought it my Business to lay down some Rules for that purpose.

The Body of the *Civil Law*, as we said before, is compos'd of Four Parts, the *Digest*, *Code*, *Institutes*, and *Novels*.

The *Laws* of the *Digest*, are generally quoted by the first Word, and Number of the *Law*; for Instance, *Lex signi tertia Digestis de Jure Codicillarum*; sometimes the Number only, or the first Word of the *Law* from whence the Quotation is taken, is set down.

When a *Law* is divided into several *Paragraphs*, after the Number of the *Law*, that of the *Paragraph*, or the first Word of it, is set down; for Example, *Lex 32. §. 11. Digestis de Donationibus inter vivos & uxorem.*

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Sometimes a *Law* of a *Title* in the *Digest*, is quoted by the first Word only, with the *Title*, without mentioning whether it be out of the *Digest* or *Code*; and in that Case, it is an Indication that the *Law* quoted is in the Collection before spoken of; that is, in the *Digest* or *Code*, according as they were before mention'd.

The *Laws* of the *Code*, are quoted after the same manner as those of the *Digest*.

The *Paragraphs* of the *Institutes*, are quoted after the same manner as the *Laws* of the *Digest* or *Code*; thus a *Paragraph* of the *Institutes* is quoted, by shewing the Number, and mentioning the first Word of the *Paragraph*, or by either; but the *Title* under which the *Paragraph* is, must always be mention'd, as thus, *Paragrapho testes 15. Institutionibus*, or else *apud Justinianum de Testamentis ordinandis*.

The *Novels* are quoted by their Number, with that of the *Chapter* and the *Paragraph*: For Example, *Novella Justiniani 185. Capite 2. Paragrapho 4.* or else a *Novel* is quoted by the *Collation*, and by the *Title*, *Chapter*, and *Paragraph*, after this manner, *In Authentico, Collatione 1. Titulo 1. Cap. 281.*

As to the *Authenticks*, they are quoted by the first Words of them, after which is set down the *Title* of the *Code* under which they are placed; for Example, *Authentica cum testator Codice ad Legem falcidiam.*

This being laid down, let us now see how we shall go about to find out a Quotation in the Body of the *Law*.

If the Passage quoted is taken from the *Digest* or the *Code*, it will be best for Beginners to turn to the Alphabetical Table, of the *Titles* at the Beginning of the Body of the *Law*; where having found the *Title* mention'd in the Quotation, they must then look in it for the *Law*; by the Number or first Word.

If the Quotation is taken the *Institutes*, they must likewise have recourse to the Table of *Titles*, and after having found the Book in which it is, look after it there, and then the *Paragraph* which is quoted.

If we would find out a *Novel*, there is nothing more to be done, than to look after it by the Number it is under.

If it be an *Authentick*, we must look in the Table of the *Code*, for the *Title* under which it is plac'd; It is so much the more easily found, because all the *Authenticks* are inserted in the *Code* in a different Letter.

168 Of the Quotations and Abbreviations.

To conclude, as those who have a Mind to look after any *Law*, waste a great deal of time in turning over the the Table or Index, they may save themselves that Trouble, by rendring the Titles of the Body of the *Law* familiar, and getting them by heart, by which means, they will acquire a general Notion of the Places where every particular Matter is treated of, and without the least Difficulty, be able to find out any *Law* they have occasion to consult.

To compleat these Instructions for young Students how to find out the Quotations in our Books, it remains only that I explain the Abbreviations.

ABBREVIATIONS.

AP. JUSTIN. *Apud Justinianum*, in *Justinian's Institutes*.

ARG. or AR. *Argumento*, by an Argument drawn from such a *Law*.

AUTH. *Authentica*, in the *Authentick*; that is to say, the Summary of some of the Emperors *Novel Constitutions* inserted in the Code under such a Title.

CAP. *Capite* or *Capitulo*, in the Chapter of such a *Novel*.

C. or COD. *Codice*, in *Justinian's Code*.

C. THEOD. *Codice Theodosiano*, in the *Theodosian Code*.

COL. *Columna*, in the first or second Column of the Book quoted.

COLL. *Collatione*, in the *Collation* of such or such a *Novel*.

C. or CONT. *Contra*, this is generally us'd to denote a contrary Argument.

D. *Disso* or *Disso*, that is, the aforesaid, or *Law* or Chapter before quoted.

D. *Digestis*, or in the *Digest*.

E. or EOD. Under the same Title.

F. *Finalis*, the last or latter Part.

ff. in the *Pandects* or *Digest*. The Grecians having made use of the Letter Π , to signifie *Pandects*, the Romans chang'd them into Two f's join'd together. *Digestorum liber ideo duplici ff. signatur, quod Greci Pandectas per \Pi cum accentu circumflexo notabant, sub quibus, & Digestorum libri comprehensi sunt, unde facili titura \Pi in ff. latine inolevit*, says Calvin in his *Lexicon Juris*.

GL. *Glossa*, the *Gloss*.

H. *Hic*, here, in the same Title, *Law*, or Paragraph.

H. TIT.

H. TIT. *Hoc titulo*, in this Title.

I. or INF. *Infra*, beneath or below.

J. GLO. *Juncta Glossa*, the Gloss joined to the Text quoted,

IN AUTH. COLL. 1. In *Authentico*, *Collatione* 1. in *Justinian's Novels*, Part or Section 1, &c.

IN F. *In fine*, at the End of the Title, Law or Paragraph quoted.

IN PR. *In principio*, in the Beginning, and before the first Paragraph of a Law.

IN F. PR. *In fine Principii*, toward the End of a Beginning of a Law.

IN SUM. *In summa*, in the Summary.

L. *Lege* in such a Law.

LI. or LIB. *Libro*, in the First or Second Book, &c.

NOV. *Novella*, in such a Novel.

PAR. *Paragrapho*, in such a Paragraph or Article of the Law, or of a Title in the Institutes.

PR. or PRIN. *Principium*, the Beginning of a Title or a Law.

II. *Pandectis*, in the Pandects.

Q. QU. or QUÆS. *Questione*, in such a Question.

RU. or RUB. In such a Rubrick or Title. The Titles were called Rubricks, from their being formerly written in Red Letters.

SC. or SCIL. *Scilicet*, that is to say.

SOL. *Solutio*, the Answer to an Objection.

SUM. *Summa*, the Summary of a Law.

§. *Paragrapho*, in such a Paragraph.

T. or TIT. *Titulus*, *Titulo*, Title.

V. or V. *Versiculo*, in such a Verse, which is a Part of a Paragraph.

ULT. *Ultimo*, *ultima*, the last Title, Paragraph or Law.



OF THE
USE and AUTHORITY
OF THE
CIVIL LAW
IN THE
Kingdom of *England*.



B *BRITAIN*, as it is separated by the Ocean ; so in the Use of the *Civil Law* it differs from all other Nations in *Europe*, the Kings thereof not allowing the *Roman Laws* so great Authority within their Dominions, as the rest of the *European Princes*. Hence it is commonly reported amongst them, that we make but very little use of the *Civil Law*. And some of the best *French Authors* who are nearest to us, have affirm'd, that the *English* make no use at all of the *Civil Law* ; into which Mistake they have been led, by observing, that none of our Countrymen have taken the Pains to Explain and Illustrate it, as the Learned of other Nations have done : For it was impossible, by the Books written in *English*, they should understand what Use and Authority the *Civil Law* was of among us.

But, in order to Treat more distinctly of the Authority of the *Roman Laws* in *Britain*, it must be first consider'd, what Princes and Governments this Nation has been under.

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der from the earliest Times; first, under the *Romans*, then the *Saxons*; after that, the *Danes*; and lastly, the *Normans*. From which several Transmutations we shall clearly distinguish what Laws the *Britains* have from time to time been govern'd by; how far the *Civil Law* has been received, and of what Authority it ought to be at this time among us.

Britain being bounded by the Ocean, was never attempted by any Foreign Power, till the time of *Julius Caesar*: For neither *Hercules*, nor *Bacchus*, nor any other of those Antient Princes (says *Diodorus Siculus*, who wrote the History of the Reigns of *Julius Caesar*, and *Augustus*) carried their Conquests so far. *Polybius* reckons what is related by the Roman Historians of the *Britains*, to be Fabulous; and *Dio Cassius* likewise says, neither the *Greeks* nor *Romans* were at any Certainty concerning *Britain*; but that all they reported of it was Guess-work. The first Roman who came over into *Britain* with an Army, was *Julius Caesar*; who having conquer'd all *Gaul*, made an Expedition into *Britain*, under pretence of revenging the Affront the *Britains* had offer'd him, by sending Supplies to the *Gauls* during the Course of his Wars; or rather excited by Ambition, and Desire of Enlarging the Limits of the Roman Empire: And after some Advantages obtained, and Hostages receiv'd for the Payment of an Annual Tribute, return'd into *Gaul*: Wherefore *Tacitus* observes, He rather Discover'd than Conquer'd *Britain* for the *Romans*.

After the Death of *Julius*, the Imperial Power shifting from the People to the *Cæsars*, the succeeding Emperors strenuously labour'd to make a Conquest of *Britain*. *Augustus* was upon the Point of coming hither with an Army, but was prevented, first, by the Revolt of the *Pannoniæ*, then of the *Cantabri*. *Tiberius* contented himself with the *Britains* Annual Tribute; which, when they refus'd to pay under *Claudius*, he Invaded *Britain*; and with the Assistance of *Aulus Plautius Vespasianus* and *Ostorius Scapula*, gave them a signal Overthrow, leading their General *Carraëtacus* in Triumph to *Rome*, and assuming the Title of *Britannicus*. But *Nero*, who was his Successor, was like to have lost this new Acquisition, had not *Suetonius Paulinus* made a brave Resistance: Nor could the *Romans*

mans render themselves absolute Masters of Britain, till *Vespasian's* and his Son, *Domitian's* time. During which Interval of One hundred and thirty Years, the *Romans* and *Britains* contended for the Sovereignty with equal Fortune; But, then being embroil'd in Factions and Civil Wars among themselves, were easily overcome by the *Roman* Generals; and, to their great Misfortune, never having been under the Administration of One Person, became an easie Prey to the *Roman* Eagles.

For both the South and North *Britains* and *Caledonians* were subdu'd under *Vespasian* and *Domitian*; and the *British* Islands, under the Conduct and Bravery of *Petius Cerealis*, and *Julius Agricola*, added to the *Roman* Empire and all Britain, then first reduc'd into the Form of a *Roman* Province: From which happy Loss, of Liberty they learnt the *Roman* Manners, Laws, Language, Eloquence, Architecture, Art of making High Ways, and all other Sciences in which the *Romans* excell'd; and, as good Luck would have it, the Memory of these Transactions has been preserv'd to us by *Tacitus*, Son-in-law to *Agricola*, and other *Roman* Historians, which otherwise would have been forgotten, and buried among the Ruins of the *Druids* superstitious Laws and Ceremonies.

BRITAIN being thus made a *Roman* Province, the following Emperors seem'd more careful of it than of the rest of the Provinces depending upon the Empire; and to quiet the Disorders and Insurrections that happen'd, visited Britain oftener than any other part of their Dominions; affecting, above all the rest of their Titles, to be called *Britannici*. Under the Emperor *Adrian*, when the North *Britains* were in Arms against his Lieutenant *Cn. Trebellius*, the Emperor coming into Britain, put them to flight; and to prevent the Incurfions of the *Picts* and *Scots*, built a Wall of Stakes and Turf of Eighty thousand Paces long: But the *Scots* breaking thro' the same, again invaded the South *Britains*: To whose Assistance *Helvius Pertinax* was sent by the Emperor *Antoninus Pius* and *Commodus*, who kept them in Awe for some time, till under *Septimius Severus*, *Virius Lupus*, then Governour of Britain, being oppress'd by the Revolt of the *Britains*, implor'd the Emperor's Assistance, who came hither, accompany'd by *Basianus* and
Geta,

Geta his Sons, and *Papinian* the Chief Justice, and continued here for Three Years, built *Adrian's* Stone Wall, subdued the *North Britains* and *Caledonians*, but not without great slaughter on his part, and at length dyed at *Tork*: This Emperor is by *Herodian* extoll'd, as more skilful than any of the rest in Warlike Affairs. He had the Title of *Britannicus Maximus*.

After *Severus* and his Son *Caracalla*, the succeeding Emperors could scarce keep *Britain* in obedience; not being a Match for them, by reason of the frequent Insurrections in other Provinces, which drew their Forces another way, and many of the *Roman* Commanders, usurping the Imperial Power, Lorded it tyrannically over the *Britains*; among whom was *Carausius* and *Alectus* in *Dioclesian's* Time; against whom *Constantius Chlorus* being made Governor, and sent into *Britain*, restor'd the Island again to the Imperial Dominions: And being declared *Cesar* by *Dioclesian*, begot *Constantine* upon *Helena*, Daughter to *Chel*, one of the *British* Kings; which *Constantine*, after his Father's Death, was saluted Emperor by the *British* Legions, and by their Power and Bravery, subduing his Rival *Maxentius*, made himself sole Master of the *Roman* Empire.

This, the most Illustrious of all *Britains*, not only honour'd *Britain* with his Birth, but by introducing a new kind of Provincial Government, under the *Prætorian* Lieutenant of *Gaul*, together with the Duke and Count of *Britain*, the Count of the *Saxon* Shore, and the Lieutenant or Vicar of *Britain*, who had the Administration of Affairs both in Peace and War committed to them: And was the first *Roman* Emperor that encourag'd the Christian Religion, and favour'd the Light of the Gospel.

Now that *Constantine* the Great was born of his Mother *Helena* in *Britain*, not only the Writers of our own History, but Strangers do affirm; and the same is strenuously asserted against *Julius Firmicus* and *Justus Lipsius*, by the Most Reverend *James Usher*, Archbishop of *Armagh*, who for his great Learning, is deservedly reckon'd an Ornament of the *British* Nation.

In this Particular only our Emperor *Constantine*, in all other Respects without Controversie the greatest of all the Emperors, was unhappy; that thro' an Over-Ambition of extending the *Roman* Empire, he translated the Seat there-
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of the Civil Law in England.

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of to *Byzantium*, a pleasant and strong place, scituated almost in the midst of the World: For the *Barbarians*, tempered by the Absence of the Emperors, quickly invaded the Empire; *Italy* was seiz'd by the *Goths* and *Lombards*, *Spain* by the *Goths* and *Vandals*, *France* by the *Franks*, and *Britain* by the *Scots* and *Picts*; after which, the total Extinction of the Eastern Roman Empire immediately ensu'd.

Constantine the Great being dead, his Sons *Constantinus* and *Constantius*, and after them, the Emperor *Gratian* kept Possession of *Britain*, till *Valentinian's* Time; whose Lieutenant *Theodosius*, once more delivered *Britain* from the Oppressions of the *Scots* and *Picts*, and put the Countrey into so peaceable a Condition, that the Emperor order'd, the Part which was subdued by *Theodosius*, should be called *Valentia*: The same *Theodosius* being afterwards rais'd to the Empire, was succeeded by his Son, the Second of that Name; and after him, by *Honorius* a Minor. The Government, during his Minority, being by his Father committed to *Stilicho*, who also reliev'd the *Britons* from the Invasions of the *Picts* and *Scots*.

But afterwards, under the same *Honorius* and *Arcadius*, the *Picts*, *Scots*, and *Attacots* invading *Britain*, now quite exhausted, and the Roman Forces employ'd in defending other Provinces against the *Barbarians*, the poor *Britons*, whose Sighs are described by *Gildas*, the most Ancient of our Historians, and after him by *Beda*, in vain implor'd the Emperor's Assistance; driven, say they, by the *Barbarians* to the Sea, and then back to the *Barbarians*, they met with Death every where. Nor was *Honorius* or *Valentinianus III.* ever in a Capacity to defend them from the Inroads of their Neighbours: So that *Britain*, about Five Hundred Years after *Julius Caesar's* first Entrance, became a Derelict.

Thus the miserable *Britons*, unable to resist the Fury of the *Scots* and *Picts*, first by them, and then by the *Saxons*, were forced to fly for Safety, some into *Bretany* in *France*, and others into *Wales* and *Cornwal*; and the few *Anglo-Saxons* that remain'd, apply'd to their Neighbour the *Germans*, for help to expel the *Scots* and *Picts*.

Britain was deserted by the *Romans*, about the Year of Christ 1455; and *Julius Caesar* first enter'd it, Sixty Years before Christ's Nativity.

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The Saxons, who were called in to help and protect the Britons against the Scots and Picts, after having subdued them, turn'd Traitors to their British Masters: Charm'd with the Fertility and Sweetness of the Countrey, they complain of not being paid their Wages, and sufficiently rewarded by the Britons: Wherefore, Hengist and Horsa undertake to satisfy their own Demands, by pillaging the People; to whom other Saxon Forces afterwards joining, they subdued the Britons in several Parts of the Island, created new Kingdoms and Principalities, and at length form'd the Heptarchy.

The first of the Seven Kingdoms was that of Kent, over which Hengist the Saxon made himself King, in the Year 443; the second was of the South Saxons, whose first King was Ella, who began his Reign in 488; the third was of the East Angles, first erected by Offa, in 575; the fourth of the East Saxons, began by Erchwin, in 527; the fifth of the Mercians, was first ruled by Creda, a Saxon, who began to Reign in 582; the sixth Kingdom was that of the Northumbrians, first possess'd by Ida, in the Year of Christ 588; the seventh and last, of the West-Saxons, was first govern'd by Cerdic, in the Year 521; whose Successors, either by their own Bravery or the Strength of their Subjects, which were reckon'd the most Warlike of all the Britains, conquer'd the rest of the Saxon Kings, extinguish'd the Heptarchy, and brought all their Dominions under the sole Power of Egbert King of the West Saxons, in the Year 800; and he first impos'd the Name of England upon Britain, and by his Edict, order'd the Britons to be call'd Englishmen; from which time, all Nations have distinguish'd us by that Name.

After Egbert, who put of the Spoils of the Saxon Kingdoms had erect'd the Monarchy of England, succeeded Ethelwolf and his Descendants, for a Hundred and Seventy five Years; during which time, they suffer'd great Slaughter and Damages by the Incursions of the Danes, who possess'd the Kingdom for some time; till the Anglo-Saxons recover'd it, and were themselves in a short time, oblig'd to quit it to the Dukes of Normandy, whose Posterity enjoy it to this Day.

But in the Time of *Ethelwolf*, the *Danes* invaded and plunder'd the Countrey of *Kent*; and under *Etheldred*, that of *Northumberland*; and afterwards, under *Elred*, *London* and *Exeter*, exacting Tribute from the *English*: At length *Swain* King of *Denmark* got Possession of the whole Kingdom, in the Year 1014; and with his Son *Canute* after him, enjoy'd it for Twenty eight Years. Upon the Death of *Canute*, the *English*, out of hatred to the *Danes*, recall'd *Edward Etheldred*, at that time an Exile in *Normandy*; who, by the Assistance of *William* the *Bastard*, Duke of that Countrey, being made King of *England*, reign'd Twenty four Years, with great Piety and Justice; and enacted several *Laws*, so just and agreeable to the Temper of the Nation, that his Memory is still venerable on that Account; and at length was canoniz'd.

Edward dying without Children, *Edgar Etheling* Grandson to *Edmond*, commonly called *Ironside*, and a Favourite of the People, endeavour'd to possess himself of the Kingdom; but being under Age, and unfit to govern, *Harold*, Son of *Earl Godwin* by King *Canute's* Daughter, seized the Throne, and got himself inaugurated by the Archbishop of *York*, in the Year 1046.

William Duke of *Normandy*, by his Embassadors, requir'd the Restitution of the Kingdom; first, because he was the nearest of Kin to *St. Edward*, as being the Son of *Robert*, by *Emma* Daughter of *Richard* Duke of *Normandy*, who was *St. Edward's* Mother; and because *St. Edward* had by Promise made him Heir to the Kingdom, in case he died without Children; and also *Harold* had by Oath engag'd himself, to assist *William* in getting the Kingdom after *St. Edward's* Death.

William came with an Army, to vindicate his own Right and punish *Harold's* Perfidy; who being slain, he was proclaim'd King in 1067: After a Reign of Twenty one Years, he was succeeded in *England*, in 1088, by *William Rufus* his second Son; who dying without Children, the Crown fell to his Brother *Henry I.* youngest Son to the Conqueror; in whom, after a Reign of Thirty five Years, and leaving no Children, the Male Line of *William* the First was extinct. He was succeeded in 1136, by *Stephen* of *Blois*, Son of *Adela*, *Henry* the First's Sister. To *Stephen* succeeded *Henry II.* and to him his Son *Richard I.* with

whom ended the *Norman* and Foreign Government; for *Richard* and his Successors were born in *England*, and accustomed to the *English Laws*: And it is much for the Honour of the *English Nation*, that tho' the *Normans*, who hated the *English*, endeavour'd all they could to abrogate their *Laws*, and introduce the *Norman Manners and Customs*; yet they still preserv'd, and have transmitted the *English Name* to Posterity.

From what is premised, the several Changes of Princes and Governments which *England* has suffered, sufficiently appear: Let us now return to the different *Laws* made under those several Changes and Revolutions, and see how far the *Civil Law* obtain'd among them, and what Authority it is of at this Day in *England*.

There is no Historical Account either of the *Laws* or Government of the *Britons*, before the Entry of *Julius Caesar*, except what we find in the *Roman Authors*: *Caesar* relates, that in *Britain* and *Gaul*, the *Druids* were both Priests and Judges, and decided all kind of Publick and Private Controversies; if Murder or any other Crime was committed, or Dispute happen'd about Inheritance or the like, they determin'd it; and such as refus'd to stand to their award, were forbid to appear at their Sacrifices: But of their *Laws* and their *Holy Ceremonies*, there is no Account extant; not being permitted to commit any thing to Writing. But *Caesar* made no Alterations in the *Laws* of *Britain*; He suffer'd them to be govern'd by their own *Kings* and *Laws*; only requir'd Hostages and a Tribute: And *Seneca* says, *Britain* before *Claudius's* Reign was *SUI JURIS*.

But *Claudius* subduing a part of the Island, introduc'd the *Roman Laws*; and by his *Edict*, silenc'd the *Druids*: Which made *Seneca* sportingly say,

*Ille Britannos
Ultra noti
Littora ponti
Et caruleos
Scuta Brigantes
Dare Romulen,*

*Colla Catenis
Fussit & ipsum
Nova Romana
Fura securis
Promere oceanum.*

'Twas He, whose All-commanding Yoke
The farthest *Britains* gladly took ;
Him the *Brigantes* in blue Arms ador'd :
When subject Waves confess'd his Power ;
Refrain'd with *Laws* they scorn'd before ;
And trembling *Neptune* serv'd a *Roman* Lord.

And *Tacitus* writes, that *Claudius* planted a Colony at *Doncaster*, to keep the Rebels in awe, and teach his Allies the Study of the *Roman Laws* ; and *Jos. Scaliger* understands the ancient Poet, of the Times of *Claudius*, when he says,

*Cernitis ignotos Latia sub lege Britannos
Sol cetera nostrum stetit Imperium.*

Tacitus also relates the Complaints of *Britain* under *Nero* in these Words ; That whereas in former times they had only one King, now they were govern'd by Two ; the Lieutenant to suck their Blood, the Procurator their Substance.

But *Britain* being intirely subdued by the Prudence and good Conduct of *Agricola*, was reduc'd into the Form of a Province by *Vespasian* and *Domitian* ; who, as well as their Successors govern'd it by the *Roman Laws*, and administred Justice to the *Britons* by *Roman Magistrates* ; such as *Proconsuls*, *Presidents*, *Legates*, *Prætors*, and latterly by Earls of *Britain*, or their Deputies ; the *British Laws* being intirely abrogated.

Under *Domitian*, the *Roman Laws* had taken so deep root in *Britain*, that *Agricola* exhorts them to build Temples, Marker-Places, and Houses after the *Roman Manner* ; and they accommodated themselves so well to the *Roman Arts*, that they learnt the *Roman Eloquence*, and Art of Pleading from the *Gauls*. And *Aristides* the *Grecian* Orator, in the time of *Mark Anthony*, places it among the Encomiums of *Rome*, that she had rendred her *Laws* common, even to *Britain* ; and extended the Use of them as far as her Empire : And *Rome* is by *Claudian* called the Mother of Arms and Laws ; and by *Sidonius Apollinarius*, the Abode or Place of Residence of the Laws.

Of the Use and Authority

The Use and Exercise of the *Roman Laws* in *Britain* appears also from this ; that under *Septimius Severus*, *Emilius Papinianus* sat at *York*, as *Præfectus Prætorio* or Chief Justice, which was the most eminent Degree in the Empire, and pronounc'd Judgment there ; concerning which, *Dio Cassius*, who wrote the Life of *Severus* is to be credited, altho' there is no mention of it in any of the other *Roman Writers*.

Severus, to wean his Sons *Antoninus*, *Caracalla* and *Geta*, from the Debaucheries of *Rome*, and keep his Legions from Idleness, came over into *Britain* ; and leaving his Son *Geta*, with some of his Counsellors and intimate Friends to govern the Inland Parts, subject to the *Romans*, went himself with *Antoninus*, at the Head of an Army against the *Caledonians* : In which Expedition, as they were riding together, *Antoninus* stopping his Horse, of a sudden drew his Sword, with intent to kill his Father ; but was prevented by the Interposition and Clamour of the Soldiers. *Severus* pass'd this over, and stifled his Resentment till he came to his Quarters, where he order'd his Son, together with *Papinian* and *Castor*, his intimate Friends, to come to him ; and having commanded a Sword to be laid before him, reprimanded his Son for making so villainous an Attempt, in the Sight of the Allies and Enemies ; and said, *If thou art desirous to put me out of the way, now kill me with thy own Hand ; or there is Papinian, who if thou commandest will obey thee.* This *Papinian* was made First Minister to the Emperor *Severus*, as well for his superlative Skill in the *Laws*, as that he was nearly related to the Emperor by a Second Marriage.

The *Caledonians* being subdu'd by *Severus*, he return'd to *York*, where he made the Edict, whereby it is provided, That if a Man had a Slave, which he bought, or came otherwise honestly by, and believed himself to have a good Title to him, tho' he proved to belong to another ; yet all Acquisitions made by that Slave, either with the present Master's Money, or by his own Work and Industry, should stand good in Law. And, on the contrary, if the Master knew the Servant to belong to another. This Edict was made in the Year when *Faustinus* and *Rufus* were Consuls, in which *Severus* died at *York* ; and was wrote by

by *Papinian* : For our Commentators are of opinion, that all the Laws both of *Severus* and *Antoninus* were written by *Papinian* with great Care and Deliberation : And the Learned think, that not only *Papinian*, but *Paul* and *Ulpian*, were both in *Britain* as Assessors to *Papinian*, and Coadjutors to *Geta* in the Administration of Affairs. All which is much for the Honour of our Nation : For there never was, nor ever will be, as *Cujacius* says, a Lawyer that excell'd, or can equal *Papinian* in that Science.

Ulpian and *Javolenus* also, bear witness in the *Pandects*, that the Government of *Britain* was under *Roman* Laws. The *British* Children were subject to Paternal Authority *ex Jure Romano*, by the *Roman Law*. And Fathers made Pupillary Substitutions ; but not unless they had first constituted their Heir by Will. And *Ulpianus* reports of *Severus*, that he gave the same Answer to *Vinius Lupus*, Governour of *Britain*. And *Javolenus*, in the Case of *Sejus Saturninus's* Will, gives his Opinion, that the Estate ought to be restor'd by the Fiduciary Heir, if the Person to whom he was by the Disposition of the Will to surrender it, happen'd to die before the time for the Restitution expir'd.

But the *Britons* not only conformed themselves to the *Roman* Laws, but affected their Manners, Language, Dress, Eloquence and other Arts, which by Divine Providence spread over the whole Countrey, that otherwise had continu'd under its Native Barbarity : For they were no whit improv'd by the *Saxons*, *Danes* and *Normans*. So that whatever our Ancestors boast of, either of Beauty or Splendor, was all owing to the Manners, Vertues and Government of the *Romans* : And the *Britons*, at length, so adapted themselves to the *Roman* Discipline, that *Gildas* reports, the Countrey was called *Romania*.

Nor did the *Britons* forsake the *Roman* Laws, till they themselves were deserted by the *Romans*, which happen'd in the Time of *Honorius* ; when a barbarous People inhabiting the other side of the *Rhine*, invading this Countrey and plundering it as they pleas'd, reduc'd the *Britons* to so great Streights, that obeying no longer the *Roman* Laws, they erected a Government of their own, as *Zozimus* says ; which, however, they did not maintain long, being conquer'd

quer'd by the Saxons, and by them oblig'd to follow their *Laws*.

But forasmuch as some of our most celebrated *Lawyers* have advanc'd, that the *Romans* never impos'd their *Laws* upon the *Britons*, but suffer'd them to use their own; upon what Foundation I cannot imagine, since it is repugnant both to the *Roman* and *British* History; and both *Camden* and *Selden*, two famous Men, maintain and prove the contrary by most evident Testimonies; of whom one has render'd our Nation illustrious, by his *Chorography* and Annals of *Q. Elizabeth*; and the other by his exquisite Skill in our *Common Law*, to which he added that of the *Mosaick* and other Nations, with a singular Knowledge of the Oriental Languages: To whom may be added, *Spelman* the famous Antiquary; all proving by substantial Reasons, that the *Romans*, having abrogated the *British Laws*, introduc'd their own, and administer'd Justice by them, as long as the *Roman* Emperors continu'd Masters of *Britain*. And we ought to be convinc'd by the Arguments of those who excell'd, both in all kinds of Learning, and in the Knowledge of the Antiquities of our Nation.

This Opinion, however, seems to be oppos'd, by the Epistle sent to Pope *Eleutherius*, from *Lucius* one of our *British* Kings; whereby he desires the Pope to transmit to him the *Roman Laws*; which would have been an Absurdity, if *Britain* had then been govern'd by them. This Epistle was first printed in the Reign of *Henry VIII.* and has been recited by some of our Modern Historians, byas'd by the Desire of doing Honour to our Countrey, in order to give it the greater Credit; in which also *Lucius*, the first Christian King, desires to be admitted by the Pope to the *Christian Faith*.

But this Epistle is liable to Suspicion, because our most ancient *British* Writers, who take notice of it, say not a Word of the *Roman Laws*; and our later *English* Historians, affirm upon many Reasons, that it is spurious; First, because it bears Date in the Year of Christ 159, whereas *Eleutherius* was not Pope before 1030; 2dly, Because many of the Words savour of the *Norman Latinity* and the *English Law*; and that the Scriptures are quored in it according to *St. Jerom's* Translation, who flourish'd about Two hundred Years after *Eleutherius*: 3dly, Because neither *Geoffrey of Monmouth*, *Hoveden*, nor any other of our antient Historians, take

take any notice thereof. There are besides several Presumptions, that help to destroy the Credit of this Epistle; as, that the Pope speaks to *Lucius* in the Plural, *Vos estis Vicarius Dei*; which manner was introduc'd by some of the later Princes; that the Stile of the *Roman* Language in those Days, did not allow of the Pope's Expression, *Se Leges Caesaris posse semper reprobari*; that the Words *Protectione* and *Pace*, are not of *Roman*, but a modern *English* Stamp; that in the ancient Copies of the *Conqueror's Laws*, this Epistle is not to be found; that the *Conqueror's Laws* and *Customs* of *London*, in which this Epistle has been publish'd, are subject to many Objections; and several other grounds of Suspicion, which the Learned Dr. Gerard Langbain, Provost of *Queen's College* in *Oxford*, together with his learned Observation upon the *Antiquities* and *Laws* of the *Romans* in *Britain*, in which, as well as in Universal History, he is most skilful, has communicated to me.

From hence, 'tis evident, the *Britons* were govern'd by the *Roman Laws*, as long as it made a Part of the Empire; 'till forsaken by the *Romans*, they were oblig'd to stoop to the *Saxon* and *Danish* Yoke.

Tho' there remains but little Appearance of the *Roman Laws*, under the *Saxon* and *Danish* Governments, as being intent in propagating their own, the more easily to keep the *Britons* in Subjection; yet it will appear, the best and most religious of their Princes, often imitated the *Romans* in administering Justice to their Subjects.

Thus under the *Saxon Heptarchy*, *Beda* tells us, *Ethelbert* King of *Kent*, about the Year of Christ 613, with Advice and Consent of his Wise Men, made certain *Decrees* to be observ'd in *Judgments* between his Subjects, according to the *Roman* Model; in which he provides in the first Place, against *Robbers of Churches*, of *Bishops*, and others; and these, *Beda* says, were wrote in *English*, and observ'd in his time. This was the first of the *Saxon* Kings that made *Laws*: Afterwards *Ina*, King of the *West-Saxons*, enacted more *Laws*; then *Offa* King of the *Mercians*, put out the *Mercian Laws*; and after these, *Alured* King of the *West-Saxons*, made several Additional *Laws*; and his Successors *Edward the Elder*, *Athelstan*, *Edmund*, *Edgar*, *Etheldred*, all *Saxons*, and *Canute* the *Dane*, publish'd their several *Laws*, which are yet extant, and have been translated into *Latin*, by *William Lambard*.

But in all these, there are few Judgments agreeable with the *Roman Laws*, which after *Justinian's* Time, were scarce known to the *European Nations*; and the *Saxon Kings* were very active in establishing their Power, altho' many of them were remarkable for their Religious Zeal; and 'tis to their shining Piety, the Erecting and Founding so many Cathedral Churches, Monasteries, and Colleges is wholly owing. But this could not be expected from the *Danes*; who being Heathens, and invading *England* in the Year 800, not only destroy'd Cities, Towns, Churches and Monasteries, but *Laws*, *Sciences*, and all kinds of Learning,

These being expell'd, *St. Edward*, Sirnam'd *the Confessor*, form'd one *Common Law*, out of those of the *English*, *Danes*, and *Mercians*, which are still called *the Confessor's Laws*; and of which the *English* afterwards grew so fond, that in the *Norman Times*, whenever the People, oppress'd by the Severity of the *Norman Laws*, murmur'd and grew tumultuous; the Kings used to sooth and pacifie them, by promising a Restitution of the *Confessor's Laws*: And in those Days, our Kings at their Coronations, oblig'd themselves by Oath to observe *St. Edward's Laws*.

Whilst the *Saxons* and *Danes* were Masters of *England*, the *Britons* who had fled from their Fury into *Wales*, were govern'd by their own Kings; yet none of their written *Laws* are extant, before their King *Howel Dha*; who, about 940, having called his Bishops and the most Learned of the Laity together, corrected the *Ancient* and made *new Laws*; which he commanded *Blegaridus Longuaridus*, a Learned Man for those times, to put into *Latin* and Publish; amongst which, the Eighty fifth Article highly commends the *Roman Law*, for providing, that where the Number of Witnesses is not defin'd, Two shall suffice; and for not admitting the Testimony of One: Yet that very *Law* mentions several Persons, whose sole Evidence is to be taken, as of the Lord between two Tenants, of an Abbat between two Monks, of a Father between two Children, of a Priest in a Matter attested before him, of a Virgin in a Rape, of a Thief impeaching his Accomplices at the Gallows; and some others. Nor can we expect much Light concerning the *Roman Laws* in these Ages; when *Justinian's Books* lay buried, and there was such an amazing Neglect of the Sciences over all *Europe*. The *Danes* especially destroy'd all
kind

kind of Literature in this Nation ; and those few *Roman* Remains which are to be seen in the Time of the *Saxons*, were taken from the *Theodosian Code*, and Fragments of *Gaius*, *Paulus*, and *Ulpian*, which with some Parts of the *Pandects*, were then extant in *Europe*.

Let us therefore proceed to the *Norman* Period, in which the first Kings made many Alterations in the Government, abrogating former *Laws* and enacting several new ones ; and laid the Foundation of the Government under our present Kings, who derive their Title and Succession from him. Now that the *Normans* introduc'd the *Use* and *Authority* of the *Civil Law* in several Cases amongst us, is plain from what follows.

William Duke of *Normandy*, having got Possession of the Crown of *England*, tho' he gave out he was Lawful Heir by *Edward's* exprefs Promise, and as his Kinsman ; yet he was not so nearly allied to *Edward* as *Edgar*, Sirnam'd *Etheling*, which signifies the Peoples Darling : And therefore, to strengthen his Cause of making War, he added another Reason, viz. the Death of *Alfred*, *Edward's* Brother, and Banishment of *Robert* Archbishop of *Canterbury* ; from all which Causes, he concluded his War to be just against *Harold* and the *English*. But as soon as he had got the Crown upon his Head, he made several Alterations in their *Laws*, and instituted new Forms and Methods in the Courts of Justice ; turning many of the *Allodial* Lands belonging to the *English* into *Feudal* Tenure, and imposing many Taxes and Tributes, to which the *English* had been Strangers till his Time : At length dying, and disinheriting his Eldest Son *Robert*, he made his Second Son *William*, Sirnam'd *Rufus*, Heir to the Crown of *England*.

This *William*, commonly call'd the *Conqueror*, in the Beginning of his Reign, was prevail'd upon by his Nobles to command *Edward the Confessor's* *Laws* to be observ'd, with such as he should add thereunto. But the Kingdom being quieted, when he applied himself to make new *Laws* out of those observ'd by the *Mercians*, *Danes*, and *East Saxons*, which were the chief People in this Nation, he preferr'd those of the *Danes*, because they came nearest to the *Laws* of the *Normans*, who were originally descended from the *Danes* ; these he mix'd with the *Laws* of *Normandy*, and then publish'd them in his

his own Name ; and many of them are still in force among us. And notwithstanding his Successors, *William II. Henry I. Stephen, Henry II.* and others after them, always pacified the People when they grew uneasie on account of the *Norman* Innovations, by promising to observe *St. Edward's Laws*; yet they never were so good as their Word, only the Barons got from *K. John* and *Henry III.* the Charter of *Liber-ties*, by which the Severity of the *Laws* before in use was moderated ; which they call'd the *Great Charter*, and which is to this time highly valued by us.

The *Conqueror's Laws* at first seem'd harsh to the *English*, and they often attempted to shake off the Yoke, but Time and Custom made them easie and familiar, and till Degrees, acceptable to the People ; for the Force of a received Custom, is very great in all Places ; and therefore, a *Law* is compared to a Tyrant, but a *Custom* to a good King : And *Laws* which are given by *Prescript*, have a kind of Servitude in them ; whereas *Customs* receiv'd by Consent, govern those that are still free.

But above all, the Hardships introduc'd by the *Laws* of the *Conqueror*, This seem'd the most intolerable to the *English*, that whereas under their former Kings, the *Laws* were writ either in *Latin* or the *Saxon* Language, he order'd all his *Laws* and Proceedings in the Courts of Justice, to be writ in the *Norman* Dialect ; which neither the *English* nor *French*, many of whom were his Subjects, could understand : And moreover, that Children should be taught the same in the Schools ; which *St. Augustine* charges the *Romans* with as a Hardship, they having order'd the Nations they conquer'd, to make use of the *Latin* Tongue in all their Judicial Proceedings : Yet this continu'd here till *Edward* the Third's time, when a *Law* was made, that all Actions and Pleadings in the Royal Courts of Judicature, should be in the *English* Tongue.

That the *Customs* of *Normandy* were mix'd with those of *England* by the *Conqueror*, is evident in many particulars ; and this the *French* say, was the Reason that *Charles* the VI. and VII. Kings of *France*, after recovering *Normandy* from *Henry VI.* whose Ancestors had held it from the *Conqueror's* Time, did not immediately reform the *Customs* of *Normandy*, as he did those of other Provinces, because they had not been alter'd by the *English*, as agreeing with their own

own native *Customs* ; the first that reform'd the *Customs* of Normandy, was Henry III. King of France, in 1583, till which time, the ancient *Customs* of that Countrey continu'd in force.

The Conqueror making use of his Absolute Power, introduc'd several new Forms, and either chang'd the Old, or erected New Courts of Justice : There is indeed some mention of *Chancellors* in the Saxon Times, but the Court of *Chancery* was instituted under the Conqueror, and continued by his Successors ; in which, a *Chancellor* appointed by the King presides, and from him all Original Writs and Patents issue : It is the first in Dignity of all the great Offices. Out of this Court also come *Feudal Inquisitions* ; and the *Chancellor* has Power of moderating the Rigour of the Law, and granting Relief in all Cases of Fraud and Deceit cognizable before him, in the same manner as the *Praetor* aided, supplied, and corrected the *Roman Law* : And tho' some Learned Men amongst us, have been of Opinion, that this Power was not granted in so full extent to the *Chancellors* by the Conqueror, but that it came to its present Grandeur by Degrees, in the Course of several Ages ; yet, 'tis certain the *Chancellors* had the same Power under Henry II. from what *John of Salisbury*, Contemporary with Thomas à Becket, says in his Book,

*Quarendus Regni tibi Cancellarius Angli
Primus sollicita mente petendus erit
Hic est qui Regni Leges Cancellat iniquas ;
Et mandata pii Principis aqua facit,
Siquid est obest populo, vel moribus est inimicum ;
Quicquid id est, per eum definit esse nocens.*

And Alexander Neckham says of Becket, That he was prais'd for cancelling unjust Laws.

In the Conqueror's Reign, the Court of King's Bench, for determining Criminal and Civil Causes between the King and the Subject was erected ; and likewise the Court of Common Pleas, for judging of Matters between the Subjects ; as also the Court of Exchequer, in which all Matters relating to the Treasury, Fines, Taxes, Confiscations, and the like, are examin'd and determin'd : And tho' some have thought that these Courts, especially the King's Bench, were

were of an older Date ; yet 'tis most certain they have subsisted among us from the *Conqueror's* Time.

But the *Conqueror* exerted his Power in nothing more than appointing the Terms for distributing Justice, and regulating the Method of Evidence, for whereas in other Parts of *Europe* the Courts of Justice are always open, except in Harvest and Vintage Seasons, and Holidays ; the *Conqueror* established Four stated Terms of the Year, of so many Days each ; out of which, no Prosecution could be carried on in any of these Supream Courts : He also appointed all Evidence of Facts, to be heard and determin'd by Twelve sworn Men, whom we call *the Jury* ; the Points of Law, if any should arise, being left to the *Judges* : Of which kind of Judgment, altho' there be some taint Appearance under the *Saxon* Government, long before the *Conqueror's* Time, yet it was by him reduc'd to a Method, and continues in the same to this Day.

The *Conqueror* also distinguish'd the Ecclesiastical from the Lay Courts ; for when under the *Saxon* Administration, the *Alderman* or President together with the *Bishop*, held a Monthly Court of Justice, called the *Centenary* or *Hundred*. He commanded the *Bishops* and *Archdeacons*, not to interfere any more in the *Hundred*, but to confine themselves to some Place appointed by the *Bishops*, and there to judge according to the *Canon* or Episcopal Laws ; and all were oblig'd to obey their Sentence upon Pain of Excommunication, and the King's Displeasure : The *Sheriffs* and other Officers being charg'd not to take Cognizance of any Matter belonging to the Spiritual Jurisdiction.

During the *Conqueror* and his Son *William Rufus's* Reigns, the *Civil Law* was not heard of in *England* ; for the *Pandects* were not restored by the Emperor *Lotharius* till the Year 1128, which was the Twenty eighth of our *Henry I.* and *Irnerius*, after long teaching the *Civil Law* at *Bononia*, died there in 1190. At the very same that he began to profess it in *Italy*, *Vacarius* did the same here ; for so *Gervasi* of *Dover*, writes in the Life of *Theobald* Archbishop of *Canterbury* under *Henry I.* *Tunc Leges & Causidici in Angliam primq vocati sunt quorum primus Magister Vacarius hic in Oxenfordia Legem docuit.* Now *Vacarius* read Law in the Year 1149, which was the Fourteenth of King *Stephen*, as appears from the *Norman History*, written by *Andrew Quercetanus*

tanus, where he speaks thus of *Vacarius*; *Magister Vacarius gente Longobardus vir honestus & juris peritus cum Leges Romanas, anno ab Incarnatione 1149; in Anglia Discipulos doceret & multi tam divites quam pauperes, ad eum causa discendi confluerent suggestione pauperum de Codice & Digestis excerptos novem Libros comp'suit, qui sufficiunt ad omnes Legum lites quæ in Scholis frequentari solent, siquis eos perfecte noverit.* And the Civil Law was profess'd here by *Vacarius*, before *Placentinus* profess'd it in France, who after *Vacarius's* Death began to read upon it at *Montpellier*, in the Year 1196.

The Learned *Mr. Selden* speaks very much in Commendation of this *Vacarius*, believing him to be the *Rogerus* who is reckon'd amongst *Irnerius's* Scholars, and who wrote the Treatise *De Prescriptionibus*, so highly esteem'd and prais'd by the Interpreters; and that he was the Author of that *Summary*, which excited *Placentinus* to make his after him; and *Azo* another, which all the Writers allow to be the best *Summary* of the Civil Law. Besides, 'tis plain this *Vacarius* was a Person of repute, from his being afterwards made Abbat of *Bech* in *Normandy*, and then upon the Death of *Theobald*, elected Archbishop of *Canterbury*; which See, either out of Religion, or fondness of a Monastick Life he refus'd, and died in the Monastery of *Beck*, in the Year 1180.

In the same Reign, *Theobald* Archbishop of *Canterbury* sent *Thomas Becket* to *Bologna* in *Italy*, there to Study the Civil Law, in order to qualify himself for Publick Business; who, upon his return was made Doctor of Law at *Oxford*, and is reckon'd one of the principal Civilians of that University: He was afterwards sent by the same *Theobald* to *Pope Celestine*, to move him for the Revocation of the Legatine Power granted to *Henry* Bishop of *Winchester*, the King's Brother; and Three Years after King *Stephen's* Death, by the Interest of *Theobald*, made Chancellor of *England*, by *Henry II.*

But so far as almost all the Clergy and Laity in King *Stephen's* time, applied themselves to the Study of the Civil Laws, and the Number of Students became incredible; the Divines, and Masters of Arts, either moved by Envy, or a View of ingratiating themselves with the Bishop of *Winchester*, who was *Theobald's* declar'd Enemy, prevail'd with King *Stephen* by an Edict, to forbid teaching the Civil Law

in England, and making use of Law-Books; so *Vacarius* was silenced: Which Prohibition some will have to be understood of *Gratian's* Decree, at that time not publish'd, nor did *Vacarius* read upon the Decree, but the *Laws*, which *Salisbury* says *Theobald* brought into England. But *Stephen's* Prohibition was of little Signification, for *John of Salisbury*, who was famous in those Days, writes, that the greater Opposition the Study of the *Law* met with from the Wicked, the more it flourish'd and grew into répute; and immediately after King *Stephen's* Death, the Study of the *Roman Laws* began to revive, and *Becket* was made Chancellor upon *Theobald's* Recommendation.

In those Days, every one that affected Learning, both Civil and Ecclesiastical Persons, eagerly pursu'd the Study of the *Civil Law*, as the High Road to Rewards and Preferments; and the Authors of those Times, as *Jo. Sarisburiensis*, *Pet. Blesensis*, and *Girald. Cambrensis*, all shew by their Writings, that they were skill'd in the *Civil Law*; which is the Reason that the Professors of Divinity, Philosophy, and Arts of that Age have left grievous Complaints against the *Roman Laws*, the Admission of which, had extinguish'd all other Studies; that those who applied themselves to the *Law*, did not qualify themselves for it as they ought, by the previous Knowledge of other Arts; and that the Clergy were over diligent in following it: All these Faults, *Giraldus Oxoniensis* blames in the Students of his time; and tells us of a certain Clerk called *Martin*, who reprehended the *Oxonians* in a Publick Assembly, for suffering the Imperial *Laws* to smother the rest of the Sciences, as *Minnervius* a famous Orator of *Paris* had foretold: All which, *Giraldus* wrote under *Henry II.* for he Dedicated his Works to *Baldwin*, Archbishop of *Canterbury*, who held that See in his Reign. And *Daniel Morley*, who travell'd first into *Portugal*, and then to *Tholouse* to Study; after he return'd to *Oxford*, where he says the Study of the *Civil Law* was in great vogue; complains, that *Aristotle* and *Plato* were shut out of Doors for *Sejus* and *Titius*, and *Ulpian's* Traditions deliver'd in Golden Letters: And *Roger Bacon*, a great Philosopher and Mathematician of the same Age, blames the Prelates for neglecting the Study of Divinity, and that the Cavils of the *Law* had obscur'd Philosophy; putting them in mind at the same time of King *Stephen's* Pre-

Prohibition ; and that the *Regulars*, viz. the *Franciscans* and *Dominicans*, tho' otherwise very ignorant, were famous for their great Skill in the *Law* ; and the *Secular Priests*, out of Covetousness and a Desire of Preferment, had for Forty Years addicted themselves to the Study of the *Law* ; and not wrote one single Treatise in Divinity all that time.

In the Reign of *Henry III.* *Stephen Langton*, a celebrated Professor of Philosophy and Divinity in *Paris*, and afterwards Archbishop of *Canterbury*, rattles off the Monks of his time, for affecting to be called *Lawyers* and *Decretists*, and forsaking the Field of the true *Boox*, that is, the Holy Scriptures, and betaking themselves to Secular Knowledge for Worldly Interest. And *Robert Holcot*, of the Order of Preachers at *Northampton*, complains of the vast Numbers that flock'd to the Study of the *Civil Law* ; *Leges & Canones istis temporibus innumerabiliter sunt fecunda, concipiunt divitias & pariunt dignitates ad illas confluunt, quasi rota multitudo Scholarum his diebus.* Now *Morley* flourish'd in the Reign of *Richard I.* *Neckhamus* and *Longtonus* under *Henry III.* and *Holcot* under *Edward III.* And *Eatred* Abbat of *Ri----*, in the Diocess of *Tork*, and *Hugo de St. Victoire*, writing of the Abuses in Monasteries, reckon up Twelve, in which *Monachus Causidicus*, or a *Monk-Lawyer*, has the Fifth Place.

But the flourishing State of the Civil Law at *Oxford* at that time, is sufficiently evident from the Professors of it, whose Memory is preserv'd to this day : For soon after *Irnerius*, there were many famous Professors of it at *Oxford*, who were in great reputation, even with the *Italians*.

Amongst them is *Aldricus*, Professor of Laws at *Oxford* ; whose Sayings are often quoted by *Accursius* in his Glosses, and who was the Author of many Learned Books upon the *Civil Law*.

After him, *Richard*, surnamed the *Englishman*, and *William de Doroedea*, were, according to *Jo. Andreas*, Professors of Laws at *Oxford*. The first of them wrote a Copious Treatise, entituled, *Summa Ordinis Judiciorum* ; the latter, another *De Ordine Judiciorum*, and is by *William Dorochius* and others called *William of Drogheda*.

After these, came *Alanus*, *Gulielmus*, *Jo. Severleus*, Professor of Laws at *Oxford*, who publish'd Lectures upon the *Civil Law*, *Stephanus Anglus* and the Famous *Mylius*, with many

many others : And the Universities so abounded with Students of the Law, that *Matth. Paris* reports a Constitution of Pope *Innocent IV.* then publish'd; forbidding the Admission of any Advocate or Professor of Laws to any Ecclesiastical Dignity, and the reading of the *Civil Law* for the future in the Kingdoms of *France, England, Scotland, Spain* and *Hungary*, notwithstanding the respective Kings and Princes should consent thereto : But these Princes still preserved the Imperial Laws ; and our Kings, especially *Edward I.* and *Edward III.* were great Friends and Favourers of the Students and Professors thereof.

In *Edward* the Third's Reign, when the Chapter of *Winchester* had elected *William de Raleigh* for their Bishop, against the King's Inclinations, he appeal'd from their Election to the *Roman Pontiff*, and sent his Appeal to the Readers of the Law, and other Men skilful in that Science at *Oxford* for their Opinion, who approved of it.

In the same Reign, when *Masters* and *Batchelors* in *Divinity* and *Arts* at *Oxford*, trusting in their Numbers, made certain Statutes against the *Doctors* and *Batchelors* of *Laws*, relating to the Answers of the *Batchelors* in both Faculties, and had proceeded to a Sentence of *Proscription* against such as refused to submit to them, the King, upon Complaint of the *Doctors* and *Batchelors* of *Laws*, appointed the Bishops of *London* and *Ely*, and others his Delegates, to examine the matter ; who having heard the Parties, avoided the Statutes, and revoked the Sentence ; and the same was afterwards ratified by the King's Charter, wherein he promises his singular Favour and Protection to the *Doctors* and *Students* of the *Civil Law*. All which was afterwards confirmed by the Charter of *Richard II.*

But the Lawyers of other Countries relate, that our King *Edward I.* out of his Care to have the *Civil Law* taught in *England*, (a Circumstance omitted by our own Authors) invited *Francis Accursius*, Son of the Famous *Accursius* who wrote the *Glosses*, from *Bologna*; where he profess'd the Law, into *England* to teach it at *Oxford* ; who taking *Tholouse* in his Way, read Publick Lectures there upon the Famous Law. *L. unic. C. de Senten. qua pro eo quod interest.* Of which *Bartolus* takes notice in his Commentaries upon the same ; and he was called the
King

King of England's Advocate by him, and was sent to read Law at Oxford; and there is still extant a Precept to the Sheriff of Oxfordshire to put him in Possession of the Royal Mannour at that Place, for him and his Family to dwell in: He had accordingly the Mannour of Marlegh given him for that purpose, which then was in the King's hands, by reason of the Minority of Hugo Le Dispense Son of John deceas'd, who held the same in Capite; in which Precept the King calls Francis Accursius his Trusty and Well-beloved Secretary: And the same Accursius seems to be described in another Letter, wherein he is called Francis of Bologna, Doctor of Laws, and Counsellor to the King of England. But whether he taught the Law at Oxford, is not certain: For all that the Italian Authors say of him, is, that fearing his Goods should be confiscated, he return'd to Bologna.

The same King Edward, when, upon the Death of Alexander King of Scotland, there arose that arduous Question between the English and Scotch, concerning the direct Dominion of all Britain, and the Parliament was summon'd to meet at Norham upon Tweed; sent for all the Canonists and Civilians throughout his Dominions; because he look'd upon them to be the most proper Judges of the Affair in Dispute.

Another remarkable Monument is the Letter of King Henry to the other University of Cambridge; wherein he commands the Students in the Civil and Canon Law, diligently to attend the Publick Lectures in their respective Faculties; and to pay the Ordinaries and Beadles belonging to the same their Annual Salaries.

This Letter, Caius, in his Defence of the Antiquity of this University, says, was wrote by Henry I. in the Year 1101, and is still preserv'd in their Registry: But it is utterly inconsistent with the History of those Times: For Justinian's Books were not then recover'd by Lotharius; nor had Gratian publish'd his Edict; nor did any of our Kings take upon them the Stile and Titles of Lord of Ireland, before Henry II. nor of King of France, before Edward III. So that this Letter must have been from Hen-

From what has been said, it is plain, the Study of the *Civil Law* has flourish'd in this Kingdom from the Reign of King *Stephen*; that our Kings have ever had it in their Royal Protection, and since the Reign of *Henry VIII.* allow'd an Annual Salary for the Maintenance of *Royal Professors* of the *Civil Law*, who before were supported by Contributions from their Audience. And in the University of *Oxford* King *James I.* besides the Yearly Stipend, added a *Prebendary* in the Church of *Salisbury* towards the Support of the *Professors* of the *Civil Law* in that University: Besides which, several of the Founders of Colleges in both Universities have appropriated many Fellowships for the Maintenance of Students in the *Civil Law*.

When the Episcopal Power decreas'd, the Revenues of the Church began to be diminish'd, and the Study of the *Civil Law* languishing for want of Encouragement, *Edward the Sixth*, a Prince endow'd with all kinds of Royal Virtues, and a great Encourager of Learning, took care to to revive it: For in the second Year of his Reign having appointed the Earl of *Warwick*, the Bishops of *London*, with *Rocheſter* and Lord *Paget* Comptroller of his Household, and several other Great Men, to visit both Universities, he gave them Instructions, That whereas it had been represented to him, that the Study of the *Civil Law* in both Universities did not only slacken, but was in danger of being totally extinguiſh'd; therefore they should use all their Power to revive and encourage the same.

So much for the *Civil Law* in the *Schools* and *Universities*. It remains, that we shew, of what Use and Authority it is in the Courts of Justice.

The Kings of *England*, above all other Princes of *Europe*, boast of their Independency of the *Roman Empire* and its Laws; because the *Romans* had no other Right, but that of Arms, to *Britain*; which, at last, they relinquiſh'd to the Natives. Hence it is, that the *Italian*, *Spanish*, and Lawyers of other Countries commonly assert, that our Kings acknowledge the Emperor neither in Law nor Fact, have no Superior in their Dominions but God alone; exercise all Rights of Sovereignty; are Monarchs, and, as Sovereign

reign Princes, no Appeal can lie from them ; that since *Constantine the Great*, they have Power of wearing the Imperial Crown, and in the Ceremonial Books of the Church of *Rome*, are set down among the few Kings who are Crown'd and anointed by their own *Laws* : Therefore *Cujacius* had no Foundation for saying, the Kings of *England* were once *Feudatories* to the Emperor, but those of *France* never ; whereas both *France* and *England* shook off the Imperial Yoke in the same Age. But the *Britons* make another Title, that is, of a Derelict ; for they were utterly abandon'd by the *Romans*, whose Assistance they implor'd against the *Scots* and *Picts*, and that they might be intirely a free People, did not permit the *Roman Laws* to be mix'd with their own.

For this Reason, perhaps, our Interpreters say, that when other Princes or Private Persons mention the *Law* in *Bargains*, *Contracts*, *Statutes*, *Compromises*, *Wills*, or other Acts whatsoever, it is to be understood of the *Roman Civil Law*, which is common to all Nations ; but when the King of *England* mentions the *Law*, his own, that is, the *Law of England*, is always intended : And therefore, *Edward II.* made a *Law*, that the Imperial *Notaries* should not exercise their Office in the Kingdom of *England*, lest he should thereby seem to acknowledge a Dependence upon the Empire.

But our *Lawyers* do not allow the Kings of *England* the same Independency in relation to the Pope, to which See they say they are *Feudatories*, and that King *John* surrendred and acknowledg'd himself to be a Vassal of Pope *Innocent III.* Wherefore, when *Alexander III.* allow'd the Question concerning Possession of Lands in *England* to be determinable by *Henry II.* *Johannes Hostiensis* observes, that if it had happen'd in King *John's* Reign, the Pope, without derogating from the Royal Authority, might have taken upon him to decide the Question ; because that King had made his Kingdom *Feudatory* to the See of *Rome* : And therefore, all *English* Malefactors apprehended in *England*, were not to be sent to *Rome*, but punish'd here by the Pope's *Marshal*. But these are vain Pretensions ; for the Popes have no other Proof than the Grant or Promise of a certain Tax by *Ina* one of our *Saxon* Kings, and *John*, from whence they pretend our

Kings are tributary to them : Besides, there is a wide Difference between being Tributary and Feudatary ; for *Cujacius* himself allows, that *Charles* King of *France* paid a Tax to the Pope, and yet all the *French Lawyers* assert their Kings are more independant than any, of Foreign Jurisdiction : But our Kings could in neither of these Cases oblige their Successors nor any ways impair their Rights, without the Consent of Parliament.

The *English* have ever preserv'd their *Laws* with the utmost Exactness ; and when any Attempt has been made in Parliament to change or moderate them with the Equity of the *Roman Law*, it has been strenuously oppos'd, of which there are several Instances in the Journals ; Thus when the Bishops in *Henry* the Third's time, moved for an Act to Legitimate Children by subsequent Marriage, as *Justinian* has, upon very good and sufficient Reasons set forth, in the *Constitution* for that purpose, and the Church allow'd the same ; the Earls and Barons unanimously answer'd, *Nolumus Leges Angliæ mutari, quæ huc utque usu sunt approbatæ* : We will not suffer the *Laws* of *England*, hitherto approved by use, to be changed. In the Parliament under *Richard II.* when *Thomas* Duke of *Glocester*, and others of the Nobility accused *Alexander Nevil* Archbishop of *York*, *Robert de Vere* Duke of *Ireland*, and others of Treason, and the Common *Lawyers* and *Civilians* were requir'd to give their Opinion ; they answer'd, that the Complaint or Accusation was not regular, either according to the *Law* of *England* or the *Civil-Law* : But the Earls and Barons said it was according to the *Usage* of Parliament, and protested they would never suffer the Kingdom of *England* to be govern'd by the *Roman Law*. And tho' 'tis not unlikely this might have been the Effect of Passion, and the Heat of those factious Times, yet it has been ever since duly observ'd ; and all Authority and Use of the *Civil Law*, utterly excluded from the Courts of Justice, wherein the *Law* of *England* is practis'd.

The Courts of Justice in this Kingdom proceed differently, some according to the mere *Law* of *England* ; as the Court of King's Bench, Common Pleas, and other inferior Courts depending on them ; others do not follow the mere *Law* of *England*, but proceed according to Equity and good
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Conscience ; as the High Court of *Chancery*, and Court of *Requests* ; of which I shall speak separately.

The Courts which follow the mere *Law of England*, have nothing in them common with the *Roman Civil Law* ; for they admit of no Proof but what is given by the Evidence of living Witnesses in Court ; of which our Jury of Twelve Men, who are sometimes ignorant both of *Law* and *Letters*, are Judges ; the Points of *Law* only arising upon the Fact, being left to the Direction of the Judges.

Now the *Law of England* consists of certain *Customs*, (and therefore is called *Customary* and *Unwritten*,) and the *Statutes* enacted by the King, in and with the Advice of his Parliament ; wherein, if any Cases are omitted, or Difficulties arise from the Ambiguity or Obscurity of the *Laws*, which may require Explanation, the Judges have not recourse to the *Civil Law*, as in other Nations of *Europe*, but are left to their own Judgments and Consciences, unless the Difficulty be very great, and then it is refer'd to the Parliament.

To this *Law of England*, we add the Writings of certain famous *Lawyers* ; as *Glanvil*, *Bracton*, *Briton*, *Thornton*, and *Fleta*, who have explain'd the *Customs* and *Laws of England* in their Works, as *Papinian*, *Ulpian*, and *Paul*, did those of the *Pretors Edicts* and *Constitutions* ; to which afterwards were added the Yearly Reports of adjudge'd Cases, in the Royal Courts of Justice under our Princes, from the Time of *Edward III.* wherein the Arguments and Reasonings of the several Judges are reported, very often with great Accuracy and Judgment ; and these have since been enlarg'd, by the Reports of *Dyer*, *Plowden* and *Coke*, all celebrated *Lawyers*, of Cases adjudge'd in their Times : And these Books of *Reports*, are now used as *Commentaries* and *Interpreters* of the *Law of England*.

The first Writer upon the *English Law*, is *R. Glanvil*, who was Chief Justice under *Henry III* after him, *Henry Bracton*, likewise Chief Justice under *Henry III.* then *John Briton*, Justice of *England*. And under *Edward I.* *Gilbert Thornton*, Chief Justice of *England*, abridged *Bracton* ; about which time, an uncertain Author, called *Fleta*, lately publish'd by the celebrated *Selden*, reviv'd the Name of *Thornton*, almost buried in Oblivion. Yet neither the Writings

of these Learned Men, nor the Reports before mentioned, have the Authority of *Law*; for these Treatises were written by Men that had no Power of making *Laws*; nor are the Judges for the time being, oblig'd to follow the Opinions of their Predecessors, unless they find the Case agrees in all Points with that before them: For no one has a Power over his Equal; nor a preceding Judge, any Right or Authority over his Successor; their Powers being in all things alike, and their Judgments to be directed by the the *Laws*, not by Precedents, as *Justinian* has observ'd.

All these Common *Lawyers*, were excellently well versed in the *Civil Law*, from whence they have borrow'd a great deal, both to explain and illustrate the *Law of England*. *Bracton* was Professor of *Civil Law* at *Oxford*, and *Briton* Doctor of *Laws*; and both *Glanvil* and *Bracton* began their Books in the same Words and Method, as *Justinian* does his *Institutes*; and their Treatises often quote the *Civil Law*, and apply the Authority thereof, not only in deciding Private Matters, but such as relate to the Publick Administration. And so much was the Study of the *Civil Law* in fashion for the Space of Two hundred Years, between the Reigns of *Stephen* and *Edward III.* that it was frequently cited, not only in the Universities, but at the Bar, in Pleadings, Reports, and Judgments of Causes, which *Selden* has shewn by many Examples in his Writings upon *Fleta*; the Professors of the *Civil Law* were in so high Esteem in those times, that under *Henry II.* there were several famous for their Skill therein, who were also Clerks; as *Simon de Patshull* Dean of *St. Paul's*, *Philip Lovell*, *John Mansell*, and many others, advanc'd to be Judges in the Supream Courts of Justice.

The Courts which do not proceed by the mere *Law of England*, but according to Equity and Conscience, are first, the High Court of *Chancery*, in which there are many Things that agree with the *Civil Law*. In this Court, Actions are carried on by Petition or Bill, Witnesses secretly examin'd, the Acts or Decrees of Court written in *English*, not in *Latin* or *French*; there is no Jury, but all Sentences are pronounc'd by the Chancellor; the greatest part of whom, since *Tho. Becket*, under *Henry II.* were Bishops or Clerks, and learned in the *Civil Law*, till the
Reign

Reign of Henry VIII. when Lord Rich, the first Common Lawyer, was by him made Chancellor; after whom, some Bishops Civilians, but chiefly Common Lawyers were by our Kings advanc'd to that High Office.

The Assessors, or Masters in this Court, were also generally Doctors of the Civil Law; and 'tis plain the Clerks were all well skill'd therein, from the Book of Original Writs, which is deservedly called the Foundation of the Laws of England, and Register of the High Court of Chancery, resembling the Book of Actions, publish'd for the Benefit of the Roman People by Cneius Flavius; who, as a Reward for his Service, from the Condition of a manumitted Freeman, was made Tribune of the People, and a Senator.

That these Writs and Rescripts were written with great Brevity, Accuracy, and Judgment, by Persons skill'd in the Roman Laws, is obvious to any one that reads them, and is what our late Attorney-General Noy has often observ'd to me: The Care of making these, is by Statute committed to the Clerks of this Court; who being all Civilians and Clerks, and therefore prohibited to marry, a Law was afterwards enacted in their Favour, for enabling them to enjoy their Employments, and reap the Benefit of their Studies after Marriage.

The Keepers of the Privy Seal also, in the Court of Requests, were formerly all Bishops or Prelates, learned in the Roman or both Laws; and the Masters of Requests, who by the Jurisdiction of the said Court, had Power of judging and determining according to Equity and good Conscience, were also Professors of the Civil Law; for there is no Law so well adapted to the Practice of all Courts, where Customary Law is not observed, as the Civil Law of the Romans; which contains the most ample Rules about Contracts, Wills, Offences, Judgments, and all Human Actions.

To be short, our Kings have ever cast a favourable Eye upon the Bishops, Clerks, and Professors of the Civil Law; preferring them generally to the chief Offices of the Government, as our Historians do witness: And in the Reign of Edward III. all the great Employments, as Chancellor, Treasurer, Keeper of the Privy Seal, of the Rolls, of the Wardrobe, and Chancellor of the Exchequer, were all in their Hands.

But to return to my purpose: The Courts, in which, by the Custom of *England*, they proceed by the *Civil Law* only, are reducible to Three Heads; viz. the Court of Chivalry, or Military Court, under the Constable and Marshal of *England*; the Court of Admiralty, and the Ecclesiastical Courts, under the Archbishops, Bishops, and Archdeacons; which have all hitherto continued in the Hands and Direction of *Civilians*.

In the Military Court, the Judges are the Constable and Marshal of *England*; who are of equal Authority, as to giving Judgment: But the Executive Part is wholly in the Marshal. There is no Appearance of these Officers under our Saxon Kings; they were introduc'd after the Conquest by the Normans, in Imitation of the French, who copied after the Romans, and anciently had their Constables and Marshals, from the time of Charlemagne; much resembling the Masters of Horse, and Captains of the Body Guards among the Romans, as the French Historians do testify.

These, with us, were always reckon'd Offices of the highest Honour, that of the Constable being generally conferr'd upon the King's Brethren, Uncles, or some other of the chief Nobility; and the same was Hereditary in the Family of the Staffords, Dukes of Buckingham, till it ceased in the Time of Henry VIII. So great was the Constable's Authority, that it became suspected by some of our Kings; and Chief Justice *Finex*, being ask'd by Henry VIII. how far the Constable's Power reach'd, declin'd giving a direct Answer, and said, The Decision of that Question belong'd to the Law of Arms, and not to the Law of *England*. And from thence forward, that Office was seldom given to any by our Kings, and then only *pro hac vice*.

The Office of Marshal of *England*, has likewise antiently been fill'd by many of the Chief Nobility; but Thomas Maubray, Duke of Norfolk, was the first that had the Grant of it under the Title of Earl Marshal of *England*, from Richard II. and the same Family is in Possession of it at this Day.

The Constable and Marshal, in the Military Court, have Cognizance of Crimes committed out of the Kingdom, of Contracts made beyond Sea, and Matters relating to War and Arms, either within or without the Kingdom of *England*.

If

If one *Englishman* accuse another of Treason acted in Foreign Parts, the Trial is before the Constable and Marshal; and the Proof by Witnesses, or according to the Ancient Usage of this Court, by single Combat. If one of the King's Subjects kill another in *Scotland*, or any other Countrey, he cannot be tried in any of the Courts which use the Law of *England*, but before the Constable and Marshal; nor are these Matters cognizable by the Parliament. Therefore, when the famous Sea-Captain, Sir *Francis Drake*, had commanded *Dourish* to be put to Death in *America*, in the Twenty fifth of *Eliz.* the said *Dourish's* Brother and Heir petition'd the Queen for Justice; and the Judges being consulted thereupon, were of Opinion, that the Fact was cognizable only before the Constable and Marshal: But the Queen, for weighty Reasons, refusing to appoint a Constable for that purpose, the Prosecution dropt. And lately, when *William Holmes*, an *Englishman*, killed *Wise*, another *Englishman*, in the Island of *Terra Nova* in *America*, *Anno* 1632, and *Wise's* Widow had leave to prosecute for the Death of her Husband; the Earl of *Lindsey* constituted Constable for that Occasion, and Earl *Arundel*, Earl Marshal of *England*, condemn'd *Holmes* by Sentence publickly pronounced in the Court Military, in the Month of *April* 1633, to suffer Death, which had been put in Execution, if the King had not thought fit to grant him a Pardon.

If an *Englishman* wounds another of the same Countrey in *France*; and he dies of his Wounds after his return to *England*, the Criminal cannot be tried by the Law of *England*, but the Prosecution must be in the Constable's Court; and tho' some Statutes have brought Treason in certain Cases, under the Cognizance of the Judges of the King's Bench, or Commissioners specially appointed by the King; yet the Jurisdiction of the Constable and Marshal are not understood to be taken away thereby.

The Cognizance of Contracts made in Foreign Countreys, belongs also to this Court. *Pountney*, in *Henry* the Fourth's time, brought his Action in this Court against *Borney*, for one Thousand and twenty Pounds *Englisch*, lent him at *Bourdeaux*, in *Gascoigny*, as may be seen in our *English* Law-Books; and amongst the Records in the Tower, are abundance of Instances of Judgments given in this Court.

Court, upon Civil Contracts made beyond Sea, especially in the Reigns of *Edward III. Richard II. Henry IV. V. and VI.* when our Kings were in Possession of *Normandy, Aquitaine, Gascoigny, Anjou*, and several other large Provinces in *France*; all which are taken notice of by our *Lawyers*. And 'tis an Opinion generally receiv'd, that the Cognizance of all Foreign Contracts belongs to this Court, as that of those made in the Kingdom of *England*, does to the Common Law Courts.

But this was afterwards chang'd, and the Cognizance of these Matters brought into the Courts of *Common Law*, by a Fiction declaring such Contracts to be made within the Kingdom: For now the *Law* is, that if one *Englisman* robs another beyond Sea, or enters into Covenants there, the Matter may be tried in any of the King's Courts, by supposing the Crime to have been committed, or the Contract made in some Place within the Kingdom; in the very same manner as the *Romans* preserv'd the Validity of those Persons last Wills who were taken Captive by the Enemy, by the Fiction of *Postliminy* and of the *Law Cornelia*: For when a *Roman* by falling into the Hands of the Enemy lost his Liberty, with all the Rights of a *Citizen*, and his Will, if he had made any, became void thereby; if he happen'd to return Home, he was by this Fiction supposed never to have been taken Captive, but to have been all the while in the City: But if he died in his Captivity, then the Fiction of the *Law Cornelia* came in to his Aid, and supposed he dy'd before he was taken, and was a Citizen in full Possession of all his Rights at that time. Yet there was this Difference between those and our Modern Fictions, that theirs were introduc'd by the *Roman Laws*, in favour of the Last Wills made by their Citizens; not by the Practice alone of *Lawyers*.

All Controversies relating to War and Arms, are determin'd in the Constable's and Marshal's Court. If a Foreigner, coming into *England*, raises a War against the King, he is not punishable by the *Law* of the Land, but by a *Court Marshal*: And for that Reason they are called the *Keepers of the Common Peace of the Kingdom*; which in Matters of War and Arms is committed to their Charge.

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And as there are but two Degrees of Nobility with us, viz. those of the first Rank, as Dukes, Marquisses, Earls, Viscounts, and Barons; and the second, as Knights and those we call Gentlemen: So these are distinguish'd from the common People by Arms and Ensigns, concerning which, all Controversies are cognizable in the Military Court; and there have been frequently very warm Disputes in this Court about the Right of Arms, when Two Families have claim'd the same, and one endeavour'd to exclude the other from that Right. Such were those Causes between *Reginald Grey, of Ruthin*, and *Edward Hastings*; between *Richard Scrope* and ----- *Grovenor*, between *Thomas Bedwin* and *Nicholas Singleton*, and many others; which after long Strife have sometimes been decided by Sentence of the Judges, and sometimes by Combat: For when Two or more assume the same Arms and Ensigns, or any one pretends another has no Right to bear Arms, nor being a Noble or Gentleman, or if any Man complains of Injury done him, by Diminution of his Honour, and calling his Right of bearing Arms in question. All these Matters are to be tried in the *Constable's Court*; the Dignity of which is very much augmented, by the ministerial Officers of the same; namely, *Garter King at Arms*, who regulates the Solemnities of the august Order of the Garter; *Clarencieux King at Arms*, for the South; and *Norroy King at Arms* for the North: And under them, Six inferior Officers, whom we call *Heralds*, whose chief Business it is, to be the Messengers of Peace or War, to adjust the Order of Precedence, make out Genealogies, and Arms of Families, to Order the Solemnities at the Coronations of our Kings, and of Duels before the Constable and Marshal; to lead up the Funerals of Noblemen and Gentlemen who are bury'd publicly; besides many other Things incumbent upon them by their Office. And all these are associated in one College, endow'd with many Privileges by our Kings; and exercise their Offices under the Power and Jurisdiction of the Constable and Earl Marshal.

Now the Use and Authority of the *Civil Law* in this Court, is allow'd by all our Common *Lawyers*; and therein is termed the *Law of the Kingdom*, the *King's Law*, and the *Law of the Land*: And it is confess'd, that the Causes

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cognizable in this Court, are to be tryed by the *Civil Law* and *Custom of Arms*; and not by the *Common Law* of *England*; For which Reason, such Criminals as are condemn'd in this Court, neither forfeit Estate, nor Blood.

When the Constable and Marshal are otherwise employ'd by the Publick, some Doctor, or other expert Civilian, is appointed to preside in this Court; and under *Edward IV.* there was a *Promoter of Royal Causes* constituted in this Court; which Employment, King *Charles* in the Seventh Year of his Reign was pleas'd to confer upon *Me*, by his Letters Patent under the Great Seal of *England*; for all Causes therein, are prosecuted according to the Form prescribed by the *Civil Law*, that is, by Libel or Petition, Witnesses secretly examin'd, Exceptions, Replications, and all other Things, done according to the Rules of the *Civil Law*; Sentences and Appeals put into Writing: And for the Honour of this Court, when any Declinatory Exception is made to the Jurisdiction thereof, the same is made to the Privy Council; and all Appeals from Definitive Sentences, to the King himself, and not to the *Chancellor*; who generally appoints some of the Peers, and Doctors of *Civil Law* for his Delegates. All this is to be made out by the Publick Acts of this Court, which are to be seen amongst the Records in the Tower; in which we may also meet with several learned Quotations out of the *Civil Law*.

Secondly, In the *Admiral Court*, the High Admiral of *England* is Judge, or his Lieutenant or others delegated by him: Now the *French* affirm, that this Office of Admiral had its Original from them, and from thence grew in fashion in other Countries; it does not indeed appear that we had any Admiral under the *Conqueror*, and several of his Successors Reigns, till *Edward* the First's Time; from which Date, our Kings have generally made some of the chief Nobility Admirals of *England*: Because in a Kingdom almost surrounded by the Ocean, it was necessary his Power should be very great, to whom the Safeguard of the Sea, and Coasts thereof, are committed: For all Crimes done upon the Sea, and Civil or Marine Transactions there, are cognizable in this Court; the Sea being with-

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but the Dominion of the *Common Law*, and under the Power of the Admiral, as our *Common Lawyers* themselves acknowledge.

In this Court, the Admiral administers Justice according to the *Civil Law* and *Customs* of the Court; for the *Common Lawyers* do themselves allow, the *Civil*, exclusive of the *Common Law* to be in use here: And therefore, Offenders condemn'd therein for Murder, Theft, Piracy or other Crimes, except Treason, forfeit neither Blood nor Estate. But because the judging of Crimes in this Court by the *Civil Law* proved inconvenient, the accused Person not being subject to Conviction, but by his own Confession, or Eye-Witnesses of the Fact, which can seldom be expected in Matters done at Sea; by which means, Offenders of the most criminal Nature often escap'd with Impunity: It was therefore enacted under *Henry VIII.* that the *Civil Law* should be so far laid aside, and Matters of Fact, in criminal Cases should be determin'd by a Jury of Twelve Men, as in the *Law of England*.

Besides the *Civil Law* in the Admiral Court, the *Laws of Oleron*, made by *Richard I.* who was in Possession of that Island, are in use; and also the *Marine Constitutions*, publish'd by several Princes at *Rome, Pisa, Genoa, Marseilles, Barcelona, Messina*, and other Places; together with the *Customs* set down in the Publick Acts of that Court. And lastly, under this Court may be reckoned the *Court-Merchant*; in which all Controversies about Contracts between Merchants, are determin'd in Equity and good Conscience, according to the Rules of the *Civil Law*.

Thirdly, In the Ecclesiastical Courts, the *Archbishops, Bishops, Archdeacons* or *Vicars-General, Commissaries* or *Officials* appointed by them, are Judges; whose distinct Power is deriv'd from the Conqueror, who separated the Episcopal from the Secular Jurisdiction: These, by the Indulgence of our Kings and *Custom of England*, have the Cognizance of many Causes both Criminal and Civil; as Blasphemy, Apostacy, Heresie, Schism, Simony, Incest, Adultery, Whoredom, Fornication, Chastity attempted, Sacred Orders, Institutions to Ecclesiastical Benefices, or Relinquishment of the same; Performance of Divine Service, Matrimony, Divorce,

voice, Tithes, Offerings, Mortuaries, repairing of Churches, Dilapidation of Parsonage-Houses, Pensions, Procurations, Wills, Codicils, Legacies, Succession to Intestates by Administration, and several other Matters which are exactly taken notice of by our *Lawyers*: All these are determin'd in this Court by the *Civil* and *Canon Law*, together with the Provincial *Constitutions* of *Canterbury*, and those of the Pope's Legates sent hither to our Kings; from all which our Ecclesiastical Law is taken, and by which it is allow'd, all these Causes are to be decided.

As to the *Civil Law* there is no dispute, for it has been receiv'd by the Consent of all, and in this Court is called the *Law of the Land*; but for the *Canon Law* there has been some Difficulty, ever since the Reign of *Henry VIII.* The Power of the Bishops and Prelates before his time, and the Deference of our Kings to See of *Rome* was so great, that most part of the Decretal Epistles contain'd in the *Canon Law* were directed to the *English*.

But after *Henry VIII.* had thrown off the Pope's Supremacy, it was propos'd in Parliament to abrogate the *Canons*, and make a new Ecclesiastical Law; the Care thereof being committed to Thirty Persons, of the highest Characters and Reputation in *Divinity*, *Civil* and *Common Law*; who, either finding themselves unequal to the Task, (for 'tis not the Work of a few, nor of one Age,) or for other Reasons, went no farther than drawing the Plan or Project of a new *Law*, which was reject'd; so the old *Canon Law* was confirm'd by a *Statute*, excepting such Articles thereof as were repugnant to *Holy Writ*, the *King's Prerogative*, the *Law*, *Customs* and *Statutes* of *England*; and the same is still in use, as in the Dominions of other Princes.

After this *Canon Law*, we receive the Archbishop of *Canterbury's Constitutions*, made in his Provincial Councils; of which, those that *Stephen Langton* directed to *Henry Chicheley*, have been illustrated with learned *Commentaries*, by Doctor *William Lynwood*, made *Official* by Archbishop *Chicheley*; who was also a great *Lawyer* in the Court of *Canterbury*; and he deserves the more to be remember'd, because he was the first of the few *English* Writers that have written upon the *Civil Law*. Whilst he was *Official*, he was sent Ambassador by *Henry V.* to the Kings of *Spain* and *Portugal*; from

Of the Civil Law in England. xxxvii

from whence he return'd, after the King's Death, to his Place of *Official*, and was made Keeper of the Privy-Seal, and Bishop of *St. David's*.

Next are the *Legatine Constitutions*, made by the Pope's Legates: First by *Orto*, and then *Othobon*, sent hither by *Clement IV.* whom also he succeeded in the Papal Chair; upon which, *John de Arbo*, Doctor of both *Laws*, has given us *Glosses* and *Commentaries*.

By all these they proceed in the Ecclesiastical Courts, according to the Rules of the *Civil* and *Canon Law*; the Action is propounded by Libel, after Suit contested; the Witnesses are examined in private, Exceptions and Replications are given, and the Terms of Causes prescrib'd by both *Laws* observ'd; the Sentences are in Writing, and Appeals lye from the Bishop to the Archbishop, from the Archdeacon to the Bishop, or directly to the Archbishop; from whom, as it was usual to Appeal to the Pope till the Reign of *Henry VIII.* so ever since Appeals are carried to the King in *Chancery*; where Delegates being appointed, either confirm or revoke the Sentence by the *Civil* and *Canon Law*; and the *Common Lawyers* acquiesce in such Sentences, and do not take upon them to examine the same, unless they find Cause for a Royal Prohibition.

And to encourage the Study of the *Civil Law* among us, after the Pope's Supremacy was abjur'd, the Doctors of *Laws* were allow'd to exercise Ecclesiastical Jurisdiction, tho' not in Orders, or married, which is contrary to the *Canon Law*.

Among the Courts of *England*, wherein Justice is administred by the *Roman Laws*, we must not forget the Two Universities of *Oxford* and *Cambridge*, honour'd by our Kings with great Privileges; from whence the Students cannot by any Prosecution be drawn to the Court of *Common Law*, but are to be judg'd by the Chancellor of the University or his Commissary, in all personal Actions of Debt, Accompts, Contracts, Injuries, and any Crimes, except Murther and Mahaim. And the same Privileges are granted to the Chancellor of *Oxford*, by *Richard II.* within the Liberties of the University; if either of the Parties be a Student, or any ways belonging to them: This University had many other prior Privileges, granted by King *John*, *Henry III.* *Edward*

xxxviii *Of the Use and Authority, &c.*

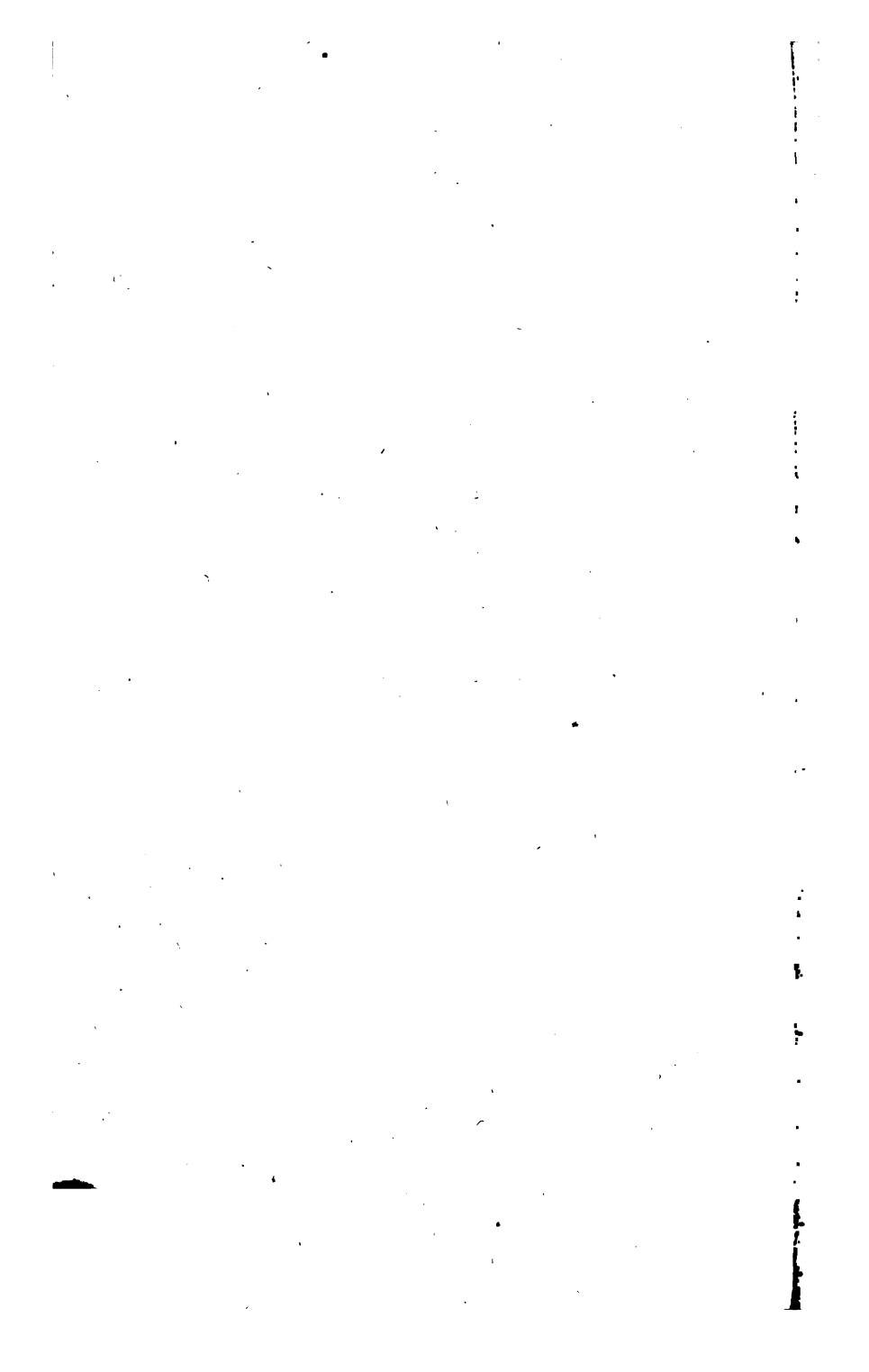
ward I. and Edward III. with a Power from the Popes and Archbishops of *Canterbury*, to Imprison, Proscribe, Excommunicate, and Suspend all Contumacious Persons: And the University of *Cambridge*, have the same; altho' most of their Charters have been lost or consum'd in the War under *Henry III.* and Fire set to the University by the Townsmen, in *Richard the Second's* Time: In all these Matters the Chancellor determines according to the *Civil Law*, and Custom of the University; which Privilege is specially granted to that of *Cambridge*, by the Statutes thereof, made in *Q. Elizabeth's* Reign: From whom there lies an Appeal to the Regents, and then to the King.

Lastly, I cannot forbear mentioning, to the Honour of the *Civil Law*, that after *Lotharius* had restor'd it, the same began to be taught under King *Stephen*; and the succeeding Kings, upon Embassies, sent Professors of the *Law*, either by themselves, or as Collegues with Noblemen; to make Alliances, Contracts, and transact other Business with Foreign Princes; it being a Rule with them, to employ *Civilians* on those Occasions: Nor indeed are others so fit for that Purpose, the *Civil Law* being common to all Christian Princes; which is evident from the Instruments of these Publick Treatises still to be seen among the Records. And *Q. Elizabeth* also employ'd *Civilians*, as her Secretaries of State, Privy-Counsellors, Embassadors, and in other Publick Offices: But in the latter End of her Reign, her Chief Ministers chose rather to use an *Amanuensis*, in transcribing Leagues and Contracts, than the Assistance of skilful *Civilians*; which continu'd also in the succeeding Reigns: Having, perhaps, fallen upon that Ancient Caution in relation to Wills, *A testamento dolus Malus & Jurisconsultus abesto*. Thus are the *Civilians* excluded both from Publick and Private Business.

As for my self, I have done my Part in shewing how highly the *Civil Law* was once esteem'd and regarded by the *English*; and that both the *English* and *French Lawyers*, *Forcatus* and *Chopinus*, were true Prophets; in foretelling, That one time or other, the *Civil Law* would be no longer in use in this Kingdom.

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